Supreme Court, U.S.
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CAPITAL CASE No.

IN THE

Supreme Court of the United States

MILTON W. MATHIS,

Petitioner,

v.

RICK THALER,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED (CAPITAL CASE)

Atkins v. *Virginia*, 536 U.S. 304 (2002), barred the execution of inmates with mental retardation (MR). Milton Mathis was required to file an initial federal habeas petition during the limitations period applicable to his MR claim. The Texas "Two-Forum Rule" (TFR) created a Hobson's choice between his MR claim and his non-MR claims in that initial federal petition. On the one hand, the TFR prohibited state courts from entertaining his MR claim during the pendency of the federal petition. On the other hand, if he pressed his unexhausted MR claim in the federal proceeding, then the "mixed" petition would have been dismissed and the non-MR claims time-barred. Misreading the TFR, the district court denied a routine stay that would have avoided the Hobson's choice altogether. Mr. Mathis ultimately brought his new MR claim in a successive federal petition.

The Court should resolve the following questions:

1. 28 U.S.C. § 2244(b)(2)(A) permits a district court to entertain a new claim when this Court announces a new, retroactive, and "previously unavailable" rule. The Fifth Circuit expressly created a circuit split on the meaning of "unavailable." Was *Atkins* "unavailable" to an inmate when, at the time of his initial federal filing, he could have raised his *Atkins* claim only at grave risk of forfeiting all other challenges to his conviction and capital sentence?

2. Do the TFR and judicial error constitute extraordinary circumstances entitling a federal petitioner to equitable tolling?

3. When a federal court rules that an inmate has made a prima facie showing of MR, does applying § 2244 violate the Suspension Clause?

RULE 14.1(b) STATEMENT

This petition stems from a federal habeas corpus proceeding in which Petitioner Milton Mathis, sought federal habeas relief on the ground that his mental retardation barred his execution. Mr. Mathis is a prisoner sentenced to death and in the custody of Respondent Rick Thaler, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The case caption contains the names of both parties to the proceeding in the court below.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Milton Mathis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Memorandum and Order of the district court dismissing the MR claim as abusive under 28 U.S.C. § 2244(b)(2)(A) and as untimely under 28 U.S.C. § 2244(d) is unreported. App., *infra*, 32a-67a. The Order of the district court vacating any ruling on the merits of the MR claim is also unreported. App., *infra*, 28a-31a. The Opinion Order of the Fifth Circuit is reported as *Mathis* v. *Thaler*, 616 F.3d 461 (5th Cir. 2010). App., *infra*, 1a-27a. The Order of the Fifth Circuit denying rehearing is unreported. App., *infra*, 87a-88a.

JURISDICTION

The Fifth Circuit entered the order for which Mr. Mathis seeks review on August 20, 2010. The Fifth Circuit entered the order denying rehearing on October 4, 2010. This Court has appellate jurisdiction to review the orders pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1254(1). The district court had original jurisdiction pursuant to its authority to grant writs of habeas corpus. 28 U.S.C. § 2241(a). Because Mr. Mathis argues that certain parts of 28 U.S.C. § 2244 may not be applied under the Suspension Clause, 28 U.S.C. § 2403(a) may apply and the notification required by Rule 29.4(b) has

been made. The Fifth Circuit did not, pursuant to 28 U.S.C. § 2403(a), certify the presence of that issue to the Attorney General.

CONSTITUTIONAL PROVISIONS

Article 1, § 9, cl. 2 of the United States Constitution ("Suspension Clause") provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATUTORY PROVISIONS

28 U.S.C. § 2244(b), enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]
>
> * * * * *

28 U.S.C. § 2244(d), also enacted as part of AEDPA, provides in relevant part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from

the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; [or]
>
> * * *
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT

A state court capitally sentenced Milton Mathis in 1999, and the Texas Court of Criminal Appeals (TCCA) affirmed the conviction and sentence in 2002. Under 28 U.S.C. § 2244(d)(1)(A), the expiration of the 90-day period for seeking this Court's certiorari review of the conviction triggered a federal limitations period that began to run on May 14, 2002. On June 20, 2002, the Supreme Court decided *Atkins* v. *Virginia*, 536 U.S. 304 (2002), barring the execution of offenders with mental retardation (MR) and triggering another federal limitations period – applicable only to the *Atkins* claim—under § 2244(d)(1)(C).

The Fifth Circuit authorized Mr. Mathis's successive *Atkins* petition because he made a prima facie showing of MR. *In re Mathis*, 483 F.3d 395, 400 (5th Cir. 2007). No federal court will complete consideration of the MR claim because, the Director contends, Mr. Mathis "strategically" omitted the claim from his initial federal petition. Mr. Mathis, however, was unable to include the MR claim in that petition without placing all other constitutional challenges to his conviction and capital sentence at grave risk of forfeiture.

Mr. Mathis was required to file his initial federal habeas petition, containing his exhausted non-MR claims, during the limitations period applicable to his MR claim. At that time, Mr. Mathis faced a Hobson's choice. The Texas "Two-Forum Rule" (TFR), a state abstention doctrine, prohibited state courts from entertaining his MR claim during the pendency of the initial federal petition. But, if he had pressed his unexhausted MR claim in the pending federal proceeding, then the "mixed" petition would have been dismissed and the non-MR claims would have been untimely when re-presented in a subsequent petition. See *Rhines* v. *Weber*, 544 U.S. 269, 275 (2005) (explaining that, because pendency in federal court does not toll the federal limitations period, exhausted claims dismissed as part of a mixed petition will usually be time-barred when re-presented in a subsequent petition); *Rose* v. *Lundy*, 455 U.S. 509, 510 (1982) (requiring that mixed petitions containing both exhausted and unexhausted claims be dismissed). Misreading the TFR in the initial federal proceeding, the district court denied a routine stay

that would have allowed Mr. Mathis to exhaust the MR claim without dismissing the pending federal petition containing the non-MR claims.

Counsel for Mr. Mathis did what a reasonable lawyer would have done to preserve his MR claim, subject to a § 2244(d)(1)(C) limitations period, and his non-MR claims, subject to a limitations period under § 2244(d)(1)(A). A reasonable attorney would not have pursued the strategies suggested by the Fifth Circuit—either withdrawing or withholding the non-MR claims in order to exhaust the MR claim in state court. Either of those suggested strategies would have gravely risked forfeiture of the non-MR claims as untimely. The following Sections set forth the complicated procedural history this case involves, and Figure 1 presents the timeline in chart form.

Figure 1: Timeline of MR Claim

State Court		Federal Court
Conviction becomes final	5/14/2002	Limitations period for non-MR claims starts
	6/20/2002	Limitations period for MR claim starts (*Atkins*)
	4/3/2003	Initial pet. containing non-MR claims filed
1st *Atkins* pet. filed	6/20/2003	
	2/2/2004	Dist. Ct. denies initial pet. containing non-MR claims
TCCA abrogates TFR (*Soffar*) and announces MR criteria (*Briseno*)	2/11/2004	
	2/17/2004	Mathis files 59(e) mot. to stay initial proceeding

TCCA dismisses state *Atkins* petition (TFR)	3/3/2004	
	3/9/2004	Dist. Ct. denies 59(e) mot.
	3/19/2004	Reconsideration of stay sought
	4/6/2004	Dist. Ct. denies reconsideration of stay
Statutory tolling becomes unavailable because TCCA denies reconsideration mot. to reinstate *Atkins* pet.[1]	4/21/2004	
	8/10/2004	Mathis seeks a COA from 5th Circuit on *Soffar* error
Trial court schedules execution for 4/20/05	1/6/2005	
	3/7/2005	Mathis moves 5th Cir. for stay in order to exhaust
	3/11/2005	5th Cir. Denies 1st stay request and COA
	4/6/2005	Mathis moves 5th Cir. for stay in order to exhaust
	4/12/2005	5th Cir. Denies 2nd stay request
2nd *Atkins* pet. filed	4/15/2005	
TCCA stays execution and remands MR claim	4/19/2005	
	6/20/2005	This Court denies cert. review of initial pet.
Trial court hears MR claim	9/16/2005	

[1] Up until this point, the TCCA could have reinstated the petition if the district court had stayed the initial federal proceeding. The limitations period applicable to the MR claim would have been tolled under § 2244(d)(2). See *Emerson* v. *Johnson*, 243 F.3d 931, 934 (5th Cir. 2001).

Trial court recommends against *Atkins* relief	1/4/2006	
TCCA denies *Atkins* relief	9/20/2006	
	9/29/2006	Mathis moves 5th Cir. to authorize *Atkins* pet.
	4/2/2007	5th Cir. Authorizes *Atkins* pet.
	4/4/2007	Mathis files *Atkins* pet.
	9/9/2007	Dist. Ct. show-cause order
	3/31/2008	Dist. Ct. dismisses MR claim
	4/23/2008	Dist. Ct. withdraws merits ruling on MR claim
	8/20/2010	5th Circuit affirms

A. The Hobson's Choice

Mr. Mathis's conviction became final when his time for seeking this Court's certiorari review of his conviction expired on May 14, 2002.[2] On that date, the 1-year limitations period applicable to his non-

[2] The Fifth Circuit suggests that Mr. Mathis contributed to his quagmire by filling his initial petition on the limitations period's final day, April 3. See *Mathis* v. *Thaler*, 616 F.3d at 468, 470. He actually filed that petition six weeks early. April 3 was the day the TCCA denied relief in the state post-conviction proceedings, but the limitations period applicable to the non-MR claims did not begin until the period seeking this Court's certiorari review of the conviction expired on May 14. See 28 U.S.C. § 2244(d)(1)(A) (specifying the trigger date as "the date on which the judgment became final by the conclusion of direct review *or the expiration of the time for seeking such review*") (emphasis added); *Jimenez* v. *Quarterman*, 129 S.Ct. 681, 685-86 (2010) (describing as "settled understanding" that § 2244(d)(1)(A) includes period for seeking certiorari review of conviction).

MR claims began to run. See § 2244(d)(1)(A). This Court decided *Atkins* on June 20, 2002. On that date, another 1-year limitations period, applicable only to the MR claim, also began to run. See § 2244(d)(1)(C). Because Mr. Mathis was preparing to file an initial federal petition while the § 2244(d)(1)(C) limitations period applicable to his unexhausted MR claim was also running, he faced a Hobson's choice between his MR and non-MR claims.

Under the TFR, he could not exhaust his MR claim if he planned to file the federal petition containing the non-MR claims. The Fifth Circuit explained:

> Mathis was also subject to Texas's procedural rules regarding co-pending state and federal habeas applications. Prior to February 11, 2004, the [TCCA] dismissed any state habeas application without prejudice if the applicant had a parallel application arising from the same conviction pending in federal court, even if the federal court stayed its own proceeding. The doctrine was referred to as the abstention doctrine or "two-forum" rule.

Mathis v. *Thaler*, 616 F.3d at 468 (citing *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972)). The Fifth Circuit erroneously noted that the TFR prohibited co-pendency only where the state petition was filed *after* the federal petition. Mr. Mathis has been unable to locate any state or federal case supporting this interpretation of the TFR. The TFR was a categorical bar against co-pendency—abstention did not depend on what sovereign's relief an inmate sought

first. See *Ex parte McNeil*, 588 S.W.2d 592 (Tex. Crim. App. 1979) ("The petitioner now has pending in [district court] * * * an application for writ of habeas corpus seeking the same relief that he seeks here. Since that court has entertained and retained jurisdiction of the matter we dismiss this application as we did in [TFR cases *Ex parte Powers* and *Ex parte Green*].") (internal citations omitted); *Ex parte Green*, 548 S.W.2d 914, 916 (Tex. Crim. App. 1977) ("*A petitioner must decide which forum he will proceed in*, because this Court will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter.") (emphasis added); *Ex parte Hernandez*, No. WR-63282-02, 2009 WL 4198849, at *1 (Tex. Crim. App. 2009) (where post-dismissal state filing indicates that state collateral proceedings were initiated first, dismissing under the TFR because "[r]eview of this conviction and sentence is currently pending in federal court").[3]

[3] The Fifth Circuit's opinion incorrectly states that, at oral argument, undersigned counsel "conceded that there is no Texas case in which the [TCCA] has dismissed a successive petition under the [TFR] if the state petition is brought before a federal petition is filed." *Mathis* v. *Thaler*, 616 F.3d at 469. The relevant comment appears at the 54:14 mark during oral argument. Undersigned counsel conceded that "[s]tate courts don't anticipatorily dismiss state cases in anticipation of federal filing. Nevertheless, they always dismiss cases once the federal filing is made. All the claimants know that. So it would have been a frivolous filing for Mr. Mathis to go into state court prior to the April 3 filing of the initial petition and file a state petition because he still has to file the federal petition on April 3, and the second he files that federal petition, the state courts are going

Moreover, Mr. Mathis could not include the unexhausted MR claim in a federal petition with the exhausted non-MR claims because a district court would have to dismiss the petition as mixed. See *Lundy*, 455 U.S. at 510 (requiring federal courts to dismiss petitions containing both exhausted and unexhausted claims). If he had then sought relief on the non-MR claims in a subsequent federal petition, then they would have been time-bared because the initial federal proceeding would not have tolled the limitations period applicable to them. See *Rhines*, 544 U.S. at 275 ("As a result of the interplay between [§ 2244(d)] and *Lundy's* dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* and after the limitations period has expired, this will likely mean the termination of any federal review. * * * The problem is not limited to petitioners who file close to the AEDPA deadline. Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion."). Mr. Mathis faced the same predicament whether he filed a mixed petition or whether he withdrew the petition containing only his non-MR claims—the non-MR claims were pending in

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to dismiss the state claims under the dual forum rule. I don't think there's any question about that in the case law." Undersigned counsel was expressly disputing the exact point that the Fifth Circuit says he conceded.

federal court for enough time that there was no limitations period remaining for them to be re-asserted in a later filing. Nor could he have delayed the filing of his initial petition, recklessly gambling that the state MR proceedings would have tolled the separate federal limitations period applicable to the non-MR claims.

Because he had to file his initial federal petition before the state courts would complete consideration of his MR claim, a state MR filing was futile—the filing of his initial petition would have been co-pending with his state MR proceeding, and the state courts would have discontinued that state proceeding under the TFR. Nor was there any way to complete the state MR litigation during the run-up to the initial federal petition, for three reasons. First, the state *Atkins* petition would not have been capable of immediate preparation and filing; it took many months to generate the clinical content an MR claim requires.[4] Second, the TCCA had effectively halted

[4] Counsel must first review trial records for guilt and punishment phase evidence of MR. If those records suggest a viable MR claim, counsel must then interview the inmate to assess his social history and functional ability before obtaining signed releases regarding potentially supportive school and medical records. Counsel must then draft record requests and send them to schools, hospitals, and prisons. The process of obtaining records—entirely outside of a petitioner's control—requires multiple calls from counsel and subsequent record requests after initial documents are received. Once obtained, the records must be reviewed for relevant information, such as IQ scores or evidence of adaptive skills limitations. Counsel must locate, interview, and obtain affidavits from persons who knew the petitioner during his developmental period. Finally, counsel

consideration of state MR claims while the Texas courts and legislature attempted to formulate substantive MR criteria that would control state *Atkins* litigation. See App., *infra*, 216a-218a; *Ex parte Briseno*, 135 S.W.3d 1, 6-7 (Tex. Crim. App. 2004) (discussing multiple failures of Texas legislature to define MR). In fact, an *en banc* panel of the Fifth Circuit has made it quite clear that Texas inmates had no state *Atkins* remedy for much of the limitations period:

> [When Petitioner] filed his *Atkins* petition on December 26, 2002, the TCCA had published no opinion explaining the factual criteria that must be pled in an *Atkins* petition, nor had such criteria become evident in practice, arising from the unpublished disposition of similar petitions. The earliest explanation occurred in [an unpublished TCCA opinion issued on February 26, 2003]. Moreover, *Atkins* specifically reserved to the states the adoption of procedures to implement its new constitutional rule, * * * and the State

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must locate a mental health expert to evaluate the materials and, many times, to administer intelligence and behavioral testing. Because most *Atkins* petitioners are indigent and cannot afford to pay such experts, counsel often must spend considerable time locating an expert who is willing to work on a volunteer basis. Only after the expert has written a report detailing her conclusion that petitioner has MR may counsel even begin to draft the state petition. Moreover, a lawyer preparing a successive Texas MR petition was not entitled to investigative or expert funding to complete any of these tasks. See *In re Joiner*, 58 F.3d 143, 144 (5th Cir. 1995); *Ex parte Blue*, 230 S.W.3d 151, 166-67 (Tex. Crim. App. 2007).

> had not taken any definitive action. *[Petitioner] could not exhaust a remedy that the TCCA had not yet articulated*; this 'cause' was external to [Petitioner] and beyond his control.

Moore v. *Quarterman*, 533 F.3d 338, 341 (5th Cir. 2008) (emphasis added). Third, Mr. Mathis could not file a "shell" state petition—one that did not fully set forth his entitlement to relief under state MR standards—because doing so would risk defaulting the MR claim or subsequently-discovered evidence supporting it on both state and federal review.

Mr. Mathis ultimately chose the least reckless of several perilous alternatives. He filed his initial federal petition—containing only the exhausted non-MR claims—on April 3, 2003. At that time, he had 41 days remaining on the § 2244(d)(1)(A) limitations period applicable to those claims, and 78 days remaining on the § 2244(d)(1)(C) limitations period applicable to the MR claim. He then filed a state *Atkins* petition on June 20, 2003—on the 1-year anniversary of *Atkins*. App., *infra*, 204a-226a. Texas had not announced a definition of MR at that time. Mr. Mathis nonetheless introduced evidence consistent with the MR formulation in *Atkins* itself. See App., *infra*, 218a-220a; *Atkins*, 536 U.S. at 318. That evidence included: a Wechsler Intelligence Scale for Children (WISC-R) score of 79, a prison-administered Wechsler Adult Intelligence Scale-Revised (WAIS-R) score of 62, and an affidavit detailing Mr. Mathis's adaptive deficits observed during the developmental period. App., *infra*, 218a-220a. In the state MR petition, he also requested: money for

investigation into his MR, an expert evaluation, and a hearing in which to present his evidence. App., *infra*, 222a-223a.

B. The District Court's *Soffar* Error

On February 2, 2004, while the state MR petition was pending TCCA authorization, the federal district court denied the initial federal petition containing the non-MR claims. Nine days later, on February 11, the TCCA abrogated *part* of the TFR in recognition of the problems it was creating for *Atkins* claimants. See *Ex parte Soffar*, 143 S.W.3d 804, 804 (Tex. Crim. App. 2004). *Soffar* eliminated the categorical bar on co-pendency, allowing state courts to entertain post-conviction challenges as long as other federal challenges to the conviction and sentence were stayed. See *ibid.* ("We now modify the [TFR] to permit consideration of a subsequent state writ * * * if the federal court with jurisdiction over a parallel writ enters an order staying its proceedings to allow the habeas applicant to pursue his unexhausted claims in Texas state court.") On the same date, the TCCA also announced the substantive criteria for state MR claims. See *Ex parte Briseno*, 135 S.W.3d 1, 7-9 (Tex. Crim. App. 2004) (setting forth three-pronged clinical definition and seven "factors" that govern Texas state *Atkins* inquiries).

Three business days after *Soffar*, Mr. Mathis moved, in a timely motion under Fed. R. Civ. P. 59(e), for the stay necessary to exhaust the *Atkins* petition that was awaiting TCCA authorization. App., *infra*, 227a. The district court, however, misread *Soffar* and denied the stay. It erroneously

stated:

> While Texas law once prohibited consideration of a state habeas application during the pendency of federal proceedings, [*Soffar*] recently held that Texas law allows an inmate to proceed concurrently in federal and state court. No legal principle exists to prevent Mathis from challenging his retardation while prosecuting an appeal in this case.

App., *infra*, 228a (internal citations omitted). The federal district court did not understand that it needed to stay the initial federal proceeding before Mr. Mathis could proceed with his MR claim in state court.

Having already held Mr. Mathis's state *Atkins* petition for 8 months while it decided the substance of and procedure for a state MR remedy, and having waited another three weeks for Mr. Mathis to seek in vain the federal stay necessary for him to proceed in state court, the TCCA dismissed the MR claim under the TFR on March 3, 2004. See *In re Mathis*, 483 F.3d 395, 396. The TCCA denied his reconsideration motion to reinstate the *Atkins* petition on April 21, 2004. See *Mathis* v. *Thaler*, 616 F.3d at 465 n.3. Because of the district court's *Soffar* error, the Texas courts could not entertain his MR claim under the modified TFR and he was forced to allege it in a successive federal petition. The district court created the very procedural mess that it later invoked to bar Mr. Mathis under § 2244.

Mr. Mathis nonetheless continued to seek the

necessary stay through every available channel. He also (1) sought reconsideration of the order denying the stay, (2) moved in district court for a certificate of appealability ("COA") on that order, (3) sought a stay in conjunction with the COA filed in the Fifth Circuit, (4) asked for a stay to exhaust the *Atkins* claim after Texas set an execution date, and (5) asked for a stay to exhaust the claim after the Fifth Circuit denied the COA on his initial petition claims. See Table 1, *supra*. This Court denied certiorari review of the initial federal habeas petition on June 20, 2005. See *Mathis* v. *Dretke*, 545 U.S. 1131 (2005).[5] During the pendency of the certiorari petition, he came within a day of execution. The TCCA finally granted a stay, in order to allow him to exhaust his *Atkins* claim, on April 19, 2005—the day before he was scheduled to die.

C. The Second State MR Petition

Before this Court denied certiorari review of the initial federal petition, Mr. Mathis filed another state MR petition on April 15, 2005. App., *infra*, 155a-203a. He again requested the resources necessary to develop and present his MR evidence in an evidentiary hearing. App., *infra*, 193a-199a. The state trial court held an evidentiary hearing from September 12-16, 2005. Family members, friends, and employers of Mr. Mathis testified to events throughout Mr. Mathis's childhood and adolescence

[5] The TFR did not lapse until certiorari was denied on the co-pending federal attack. See *Penry* v. *Coker*, No. 15918-03, 2003 WL 1845158 (Tex. Crim. App. Mar. 9, 2003) (en banc) (Womack, J., Statement respecting denial of leave).

indicative of his significant intellectual and adaptive limitations. App., *infra*, 132a-152a (collecting evidence from state hearing in federal petition). Two experts testified on Mr. Mathis's behalf in that hearing: (1) Dr. Gilda Kessner, a licensed psychologist with many years of experience conducting forensic evaluations, and (2) Dr. James Patton, a professor in the University of Texas Special Education Department who had worked with mentally retarded persons for years. App., *infra*, 127a-128a.

To evaluate Mr. Mathis, Dr. Kessner personally administered five different standardized tests, including: the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III); the Wide Range Achievement Test, Third Edition (WRAT-3); the Kaufman Functional Academic Skills Test (KFAST); the Mini Mental State Examination (MMSE); and the Rey 15-Item Memory Test (RMT). App., *infra*, 127a. Most significantly, Mr. Mathis scored a 64 on his WAIS-III, which is widely recognized as the leading test for assessing intellectual functioning. See App., infra, 128a; *Atkins*, 536 U.S. at 309 n.5 (describing the WAIS-III as "the standard instrument in the United States for assessing intellectual functioning") (citations omitted); *Rivera* v. *Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007) (noting the Director's agreement that the WAIS-III is "the best full-scale IQ test available in English"). She also analyzed his prior intelligence testing (the WISC-R and WAIS-R), interviewed Mr. Mathis for a full day, reviewed affidavits, and obtained first-person testimony regarding the three widely-

established clinical criteria for MR. App., *infra*, 127a. Cf. *Atkins*, 536 U.S. at 318 ("[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."). Dr. Kessner testified that Mr. Mathis has MR. App., *infra*, 127a.

During his testimony, Dr. Patton explained the features of mild MR, and that individuals with mild MR could lead largely independent and functional lives. App., *infra*, 127a-128a. He also reviewed a videotaped interview of Mr. Mathis and Mr. Mathis's trial testimony, and concluded that the material was consistent with mild MR. App., *infra*, 127a-128a.

Nonetheless, in January 2006, the state trial court recommended that relief be denied. See *Mathis* v. *Thaler*, 616 F.3d at 466. The TCCA ultimately denied relief on September 20, 2006. See *Ex parte Mathis*, No. WR-50772-03, 2006 WL 2706745 (Tex. Crim. App. Sept. 20, 2006). The second state *Atkins* petition had been pending for 17 months.

D. Successive Federal Proceedings

On September 29, 2006, Mr. Mathis requested that the Fifth Circuit authorize a successive federal *Atkins* petition. Noting two full-scale Wechsler IQ scores in the low 60's, the Fifth Circuit authorized the filing. See *In re Mathis*, 483 F.3d 395, 397, 399 (5th Cir. 2007). After he filed the federal *Atkins* petition, the district court issued a show-cause order, instructing Mr. Mathis to demonstrate that his MR

claim was not "available" when he filed his initial federal petition. App., *infra*, 68a-75a. The district court then held that Mr. Mathis could not meet the 28 U.S.C. § 2244(b)(2)(A) jurisdictional prerequisites for successive petitions. App., *infra*, 66a. Without conducting a hearing, it also held that Mr. Mathis's MR claim was untimely under § 2244(d) and that he was not entitled to equitable tolling. App., *infra*, 66a.[6]

The Fifth Circuit affirmed. Although it ruled against Mr. Mathis, it emphasized his extreme diligence:

> *[M]athis exhibited pattern of diligently pursuing his rights in state and federal court, despite procedural difficulties.* Mathis filed his first federal habeas petition in an attempt to pursue relief on his exhausted claims in April 2003. In June 2003, [he] filed the second state habeas application asserting *Atkins*, even though it was ultimately futile because of the Texas two-forum rule. When the two-forum rule was modified in *Soffar*, Mathis immediately acted to preserve his state *Atkins* claim by requesting a stay and abeyance from the district court. Mathis not only continued to pursue relief from the district court, by filing motions for reconsideration and appealing the denial thereof, he also moved—albeit unsuccessfully—for reconsideration in the Texas state court

[6] Initially, the district court also held that the state decision denying *Atkins* relief was not unreasonable. App., *infra*, 65a-66a. The district court later vacated that portion of its ruling. App, *infra*, 30a.

> of the denial of his second state habeas petition. * * * As soon as his motion to stay execution was denied, Mathis filed his third state petition including his *Atkins* claim in April 2005, just days before his scheduled execution. When the third state application was denied on the merits, Mathis filed his motion for authorization with this court within one week of the state court's order of denial. He also filed his successive federal petition within two days of this court's grant of authorization. *Far from sleeping on his rights, Mathis sought relief in multiple tribunals in an effort to raise his* Atkins *claim. Under the circumstances, Mathis's actions were more than reasonably diligent.*

Mathis v. *Thaler*, 616 F.3d at 474 (emphasis added). The Fifth Circuit also noted the district court's failure to understand the Hobson's choice. See *Id.* at 468 n.6 ("The district court incorrectly stated Mathis's argument as follows: 'Petitioner claims that he could not have filed his otherwise available Atkins claim in his first petition because he had not yet exhausted it.'"). Nevertheless, the Fifth Circuit decided the two statutory questions in the Director's favor. First, it ruled that the MR claim was "available" when Mr. Mathis filed his initial federal petition. See *id.* at 473. Second, it held that Mr. Mathis was not entitled to equitable tolling because the TFR was not an "extraordinary circumstance." See *id.* at 476. The opinion omitted any reference to the district court's *Soffar* error.

REASONS FOR GRANTING RELIEF

I. THE COURT SHOULD DECIDE, UNDER § 2244(b)(2)(A), WHETHER *ATKINS* WAS "UNAVAILABLE" IF, AT THE TIME OF AN INMATE'S INITIAL FEDERAL FILING, HE COULD HAVE RAISED HIS *ATKINS* CLAIM ONLY BY PLACING ALL OTHER CHALLENGES TO HIS CONVICTION AND SENTENCE AT GRAVE RISK OF FORFEITURE.

28 U.S.C. § 2244(b)(2)(A) provides that a petitioner may include a claim in a successive petition if he "shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]" Section 2244(b)(2)(A) is a new AEDPA provision that reconstituted the states' "abuse-of-the-writ" defense as a jurisdictional requirement. See *Panetti* v. *Quarterman*, 551 U.S. 930, 943-44, 947 (2007); *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000). Because *Atkins* was the first of only two new and retroactive rules announced since AEDPA's enactment (and because there has been no widespread federal habeas litigation regarding *Roper* v. *Simmons*, 543 U.S. 551, 578 (2005)), there has been no other occasion to resolve the meaning of "previously unavailable" in § 2244(b)(2)(A). Unless the Court resolves this issue, the same questions will recur every time it announces a new and retroactively applicable constitutional rule.

Two circuits use a formalistic approach, pegging availability to the date the predicate constitutional rule is announced. See REASONS FOR GRANTING

RELIEF, Section I.A, *infra*. Confronting this issue in the *Atkins* context, the Fifth Circuit expressly rejected the formalistic test. See *Mathis* v. *Thaler*, 616 F.3d at 467. Instead, the Fifth Circuit made an ad hoc assessment that Mr. Mathis's *Atkins* claim was "available," even though the TFR and the district court's *Soffar* error prevented him from including it in the initial petition.

A. The Fifth Circuit's "Strategy Choice" Rule Breaks From The Formalistic Interpretation Of § 2244(b)(2)(A) In The Fourth And Seventh Circuits.

The Fifth Circuit recognized that *Atkins* litigation requires a break from the more mechanical new-claim rules applied in other federal jurisdictions. See *Mathis* v. *Thaler*, 616 F.3d at 467. The Fifth Circuit identified formalistic interpretations of "availability" in the Fourth and Seventh Circuits, jurisdictions in which habeas remedies for new constitutional rules are deemed available as soon as the Supreme Court announces the predicate decision. See *In re Williams*, 364 F.3d 235, 239 (4th Cir. 2004) (construing § 2244(b)(2)(A) and holding that "constitutional rules that were established at the time of the applicant's last [pre-filing authorization] motion were not previously unavailable") (internal quotation marks omitted); *Bennett* v. *United States*, 119 F.3d 470, 472 (7th Cir.1997) ("You cannot file a successive habeas corpus or section 2255 case on the basis of a claim that is not newly available."). The Fifth Circuit expressly rejected the formalistic rule. See *Mathis* v. *Thaler*, 616 F.3d at 467.

After rejecting its sister circuits' rule, the Fifth Circuit failed to craft a new one. Instead, the court took an ad-hoc approach and held that the *Atkins* claim was available in the initial federal habeas proceeding because, the court surmised, Mr. Mathis made a "strategic choice" to omit it. See *id.* at 470 ("Accordingly, we hold that Mathis's habeas litigation strategy choice to withhold an *Atkins* claim from the initial federal petition, while simultaneously acting so late as to preclude exploration of other relief, did not make the *Atkins* rule 'previously unavailable' to him within the meaning of § 2244(b)(2)(A)."). As the next Section explains, a claim that is subject to a Hobson's choice—whether or not that choice is described as "strategic"—is not "available."

B. A Claim Is Not "Available" If An Inmate Cannot Assert It Without Placing All Other Constitutional Challenges To His Conviction And Sentence At Grave Risk Of Forfeiture.

Section 2244(b)(2)(A) reconstituted the states' abuse-of-the-writ defense as a jurisdictional limit, but ambiguities in that limit's content incorporate pre-AEDPA law. Having properly eschewed a definition of § 2244(b)(2)(A) that would have mechanically pegged "availability" to the date this Court announces a new rule, the Fifth Circuit then applied § 2244(b)(2)(A) in a way that conflicts with controlling precedent.

"Previously unavailable" is a term originating in the cause-and-prejudice inquiry that controlled claims not asserted in an initial petition. See

McCleskey v. *Zant*, 499 U.S. 467, 494 (1991). Failing to assert a claim in an initial petition was excused if there was "cause" for omitting it and if the petitioner suffered prejudice from its omission. See *id.* at 493-94. The new legal claim's availability at the time of an initial petition turned on whether some "*external impediment* [prevented] counsel from constructing or raising the claim." *Id.* at 497 (emphasis added and internal quotation marks omitted). The inquiry's focus was whether the new claim was "reasonably available" at the time of the initial petition. See *Duff-Smith* v. *Collins*, 995 F.2d 545, 546 (5th Cir. 1993) ("A failure to raise a claim in the first petition may not be excused for cause if the claim was reasonably available at that time.") (internal quotation marks and citations omitted); *McQueen* v. *Whitley*, 989 F.2d 184, 185-86 (5th Cir. 1993) ("To show cause, the petitioner must prove that some objective factor external to the defense prevented him from raising the claim earlier. These factors include interference by government officials or the *reasonable unavailability* of the factual or legal basis for a claim.") (citations omitted and emphasis added). A paradigmatic "external impediment" was when a judge "improperly [denied] leave to amend the petition to include the claim." R. HERTZ & L. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.c 1434 (5th ed. 2005).

Two external impediments rendered the *Atkins* claim unavailable to Mr. Mathis. First, the collision of the TFR, the federal exhaustion requirement, and the federal statute of limitations forced him to choose between his MR and non-MR claims. Second, the dis-

trict court's *Soffar* error prevented him from including his *Atkins* claim in his initial federal petition.

The Hobson's Choice. Because Mr. Mathis could not rely on the state MR proceedings to toll the separate limitations period applicable to the non-MR claims ("cross-provision tolling"), his Hobson's choice preceded the filing of his federal petition. If Mr. Mathis had filed a state MR claim and planned to seek timely federal relief on his non-MR claims, then he could have either: (1) file a federal petition containing only his exhausted, non-MR claims and expect to have his then-pending state MR claim dismissed under the TFR, or (2) sought federal relief on all claims, including the unexhausted MR claim, and expect to have that mixed petition dismissed. With the clock ticking, he had to choose between his MR and his non-MR claims.

That the TFR created this Hobson's choice between non-MR claims subject to a § 2244(d)(1)(A) limitations period and MR claims subject to a § 2244(d)(1)(C) limitations period is well-recognized. See *In re Wilson*, 442 F.3d 872, 878 ("As we concluded in [*In re Hearn*, 376 F.3d 447, 456-57) (5th Cir. 2004)], this is precisely the kind of Hobson's choice that may not be imposed on a habeas petitioner."); *Ex parte Soffar*, 143 S.W.3d at 806 ("The problematic situation is when the Supreme Court announces a 'watershed' procedural or substantive change in the law which applies retroactively to all cases, even those on collateral review. *Atkins* v. *Virginia* seems to be one such case.").

The Fifth Circuit held that *Atkins* was nonetheless available because Mr. Mathis "strategically" chose not to consolidate the MR claim with the non-MR claims after first exhausting it in state court. See *Mathis* v. *Thaler*, 616 F.3d at 470. The Fifth Circuit suggests that the filing of separate federal petitions was a strategic decision because he could have either (1) safely withdrawn the initial petition to exhaust the *Atkins* claim, and then filed a consolidated petition ("*withdraw*-and-exhaust"); or (2) safely withheld his non-MR claims until he exhausted the MR claim, and then filed them all in a consolidated petition ("*withhold*-and-exhaust"). See *Mathis* v. *Thaler*, 616 F.3d at 469 ("[H]e could have exhausted his *Atkins* claim and then filed one comprehensive federal petition."); *id.* at 470 ("They may withdraw a mixed petition, * * * exhaust the remaining claims, and return to district court with a fully exhausted petition.") (internal quotation marks omitted). Neither strategy would have preserved the timeliness of the non-MR claims.

The *withdraw*-and-exhaust strategy was not an option because the statute of limitations is not tolled while a federal proceeding is pending. See *Duncan*, 533 U.S. at 181-82. In 2003, the Director took the position that the withdraw-and-exhaust strategy would render the non-MR claims untimely. App., *infra*, 233a. Starting on May 14, 2003, a withdrawn non-MR claim asserted in a consolidated petition would have been outside the statutory limitations period. The Fifth Circuit, however, misunderstood the reason a consolidated petition containing previously-withdrawn claims would have been barred. It stated

that Mr. Mathis "could have withdrawn his first federal petition and would not have been subject to AEDPA's successive petition requirements when he returned to federal court after exhausting the *Atkins* claim." *Mathis* v. *Thaler*, 616 F.3d at 470 (citing *Burton* v. *Stewart*, 549 U.S. 147, 154 (2007)). The citation to *Burton*, which is about whether a subsequent, consolidated petition would be dismissed as successive, confirms the Fifth Circuit's mistake. The problem with voluntarily withdrawing Mr. Mathis's initial-petition claims involved the § 2244(d) limitations provision, not the § 2244(b) bar against successive petitions. The initial-petition claims would have been time-barred (not dismissed as successive) were they to be re-asserted in a consolidated petition. See *Rhines*, 544 U.S. at 275.

Moreover, the *withhold*-and-exhaust strategy would have been unacceptably reckless. To avoid forfeiting his non-MR claims as untimely, Mr. Mathis would have to gamble that the Fifth Circuit would decide: (1) to recognize cross-provision tolling; and (2) that, even if cross-provision tolling were possible, a state *Atkins* petition that the TCCA did not authorize would be considered properly filed and pending under § 2244(d)(2). Given the state of § 2244(d)(2) law at that time, no attorney would take those risks. See *Pace* v. *DiGuglielmo*, 544 U.S. 408, 417 (2005) (holding that state timeliness requirements are "conditions to filing" and that untimely state petitions do not toll federal limitations under § 2244(d)(2)); *Artuz* v. *Bennett*, 531 U.S. 4, 10-11 (2000) (holding that a state petition dismissed pursuant to a "condition to filing" does not toll federal limitations under

§ 2244(d)(2), but that a state petition dismissed pursuant to a "condition to relief" does); *Villegas* v. *Johnson*, 184 F.3d 467, 471-72 (5th Cir. 1999) (indicating that successive petition dismissed under Texas capital post-conviction statute would not toll federal limitations under § 2244(d)(2)); *id.* at 478-89 (Garza, J., dissenting) (same).

Judicial Error. Three business days after *Soffar* allowed Texas courts to proceed with habeas proceedings as long as federal proceedings were stayed, Mr. Mathis moved to stay his initial federal petition so that he could exhaust his *Atkins* claim. See STATEMENT Section B, *supra*. The district court mistakenly believed that *Soffar* had abolished the TFR entirely. See *Ibid.* Based on that mistake, the district court denied the requisite stay and created the procedural quagmire that now threatens federal review of Mr. Mathis's *Atkins* claim. See *Ibid.*

II. THE COURT SHOULD RESOLVE WHETHER THE TFR AND THE *SOFFAR* ERROR CONSTITUTE EXTRAORDINARY CIRCUMSTANCES ENTITLING A PETITIONER TO EQUITABLE TOLLING.

In *Holland* v. *Florida*, 130 S.Ct. 2549 (2010), this Court formally recognized equitable tolling for habeas claims. See *id.* at 2562. *Holland* affirmed that a petitioner is eligible for equitable tolling when "he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Ibid.* (citations and internal quotation marks omitted).

Here, the district court ruled that Mr. Mathis was not diligent; it did not reach the question of extraordinary circumstances. App., *infra*, 57a-64a. The Fifth Circuit reversed the diligence holding, explaining the exceptional steps Mr. Mathis took to preserve his federal claim. See *Mathis* v. *Thaler*, 616 F.3d at 474 (excerpted in STATEMENT Section D, *supra*). It nonetheless held that the Hobson's choice was not an extraordinary circumstance. See *Mathis* v. *Thaler*, 616 F.3d at 476. That erroneous holding is inconsistent with equitable tolling doctrine in other circuits. See REASONS FOR GRANTING RELIEF Section II.A, *infra*.

The Fifth Circuit also failed to address the prominent role the district court's *Soffar* error played in creating the limitations issue to begin with. See STATEMENT Section B, *supra*. On February 11, 2004, *Soffar* modified the TFR in recognition of the Hobson's choice it created for MR claimants. See *Soffar*, 143 S.W.3d at 804, 806-07. After *Soffar*, an MR claimant could proceed in state court *as long as he secured a routine order staying the co-pending federal proceeding*. See *id* at 807. On March 9, however, the district court held that Mr. Mathis did not need his initial proceedings stayed in order to proceed with his MR claim in state court. App, *infra*, 228a. Had the district court read *Soffar* correctly, Mr. Mathis would have exhausted his MR claim while the initial federal proceeding was stayed, the TCCA would not have dismissed the state *Atkins* petition under the TFR, and that state petition would have remained pending in state court such that it tolled the applicable limitations statute under § 2244(d)(2).

A. The Fifth Circuit's Extraordinary Circumstance Ruling Conflicts With Law In The Third And Eighth Circuits.

The availability of equitable tolling where a petitioner is caught between *Lundy's* mixed-petition prohibition and the federal limitations statute is not a new issue. Two aspects of the Fifth Circuit's extraordinary circumstance ruling are in direct conflict with Eighth Circuit law on this question. First, *White* v. *Dingle*, 616 F.3d 844 (8th Cir. 2010) held that a choice between incurring an exhaustion bar on one claim and incurring a timeliness bar on another is an extraordinary circumstance that warrants equitable tolling. See *id.* at 849 (excerpted, *infra*). Second, *White* also held that a federal court's erroneous failure to grant a routine request that would have preserved the timeliness of claims in a mixed petition was also an extraordinary circumstance requiring equitable tolling. See *id.* at 848.

White contested a magistrate's recommendation that some of the claims in his petition were unexhausted and that the whole petition should therefore be dismissed as mixed. See *id.* at 846. The district court adopted the magistrate's recommendation. See *Ibid.* While White litigated this issue in federal court, the limitations period on the exhausted claims lapsed, rendering them untimely if he were to present them in a re-filed petition. See *Ibid.* On appeal, White asked the Eighth Circuit, if it decided that any claim was not exhausted, to instruct the district court to let him amend his petition and voluntarily dismiss that claim—thereby preserving the timeli-

ness of the exhausted challenges. See *Ibid.* The Eighth Circuit failed to provide that instruction. See *Ibid.* After he was ultimately unable to amend the petition to preserve the timeliness of the exhausted claims, the Eighth Circuit considered whether its own role in creating the timeliness problem required equitable tolling. See *id.* at 847-49.

The Eighth Circuit held that a forced choice between exhaustion and timeliness, as well as judicial error exacerbating it, were *each* extraordinary circumstances warranting tolling:

> *We conclude that our failure to remand White's petition after his first appeal qualifies as an extraordinary circumstance.* * * * There is no indication that our failure to remand White's case was anything other than an oversight. * * * The state essentially maintains that White gambled and lost, and that his misstep eliminates any entitlement to federal review of his exhausted claims. This argument, however, assumes that White was required to decide between accepting the magistrate judge's initial ruling on the exhaustion question or running the risk that, if that ruling was later affirmed, he would forfeit any further federal review [because the pendency of the appeal would render his claims untimely]. *We can see no reason why a petitioner should be required to make that decision* * * * where the district court later determined that the unexhausted claims were facially viable and that its exhaustion analysis involved a debatable question warranting appellate review. * * * *Accordingly, we*

> *conclude that White has demonstrated an extraordinary circumstance that warrants tolling of the limitations period.*

Id. at 849 (emphasis added). In fact, Mr. Mathis's Hobson's choice was far graver than that faced by White. White's choice was between the timeliness of his undeniably exhausted claims and his ability to argue exhaustion on the others. See *Ibid.* Mr. Mathis, by contrast, had to choose between the timeliness of his exhausted claims and *any Atkins remedy at all.*

The Third Circuit has also held that, when a district court mishandles a mixed petition such that the claims in it are time-barred when subsequently asserted in a later filing, the erroneous order in the initial proceeding constitutes an extraordinary circumstance. See *Brinson* v. *Vaughn*, 398 F.3d 225, 231 (3d Cir. 2005) (Alito, J.) ("We conclude that the District Court's mistaken dismissal of Brinson's first petition prevented Brinson in a sufficiently extraordinary way from asserting his rights under the federal habeas statute."); *id.* at 229 (explaining that petition was improperly dismissed on ground that it was mixed).

B. The Fifth Circuit Erred When It Held That The TFR And Judicial Error Were Not Extraordinary Circumstances.

The remarkably harsh limitations ruling should be reversed. The touchstone of the extraordinary circumstances inquiry is whether the filing was obstructed by something beyond the petitioner's

control. See *Holland*, 130 S.Ct. at 2567 (Alito, J., concurring) (collecting cases). The TFR and the district court's *Soffar* error were both extraordinary circumstances beyond Mr. Mathis's control.

One of the paradigmatic situations in which tolling should be available is for petitioners caught between *Lundy* and the statute of limitations. See *Duncan* v. *Walker*, 533 U.S. 167, 183-84 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("[F]ederal courts may well conclude that Congress simply overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more of the claims have not been exhausted. As a result, equitable considerations may make it appropriate to [equitably toll] AEDPA's statute of limitations for unexhausted federal habeas petitions.") (internal citations omitted). Another paradigmatic circumstance entitling a petitioner to tolling is if a petition is dismissed and rendered untimely by judicial error. See, e.g., *Calderon* v. *U.S. Dist. Court for the Cent. Dist. Of California*, 163 F.3d 530, 542 (9th Cir. 2005) (granting tolling where proceedings were "mistakenly dismissed, through no fault of [the petitioner]"), *overruled on other grounds by Woodford* v. *Garceau*, 538 U.S. 202 (2003). Finally, the interest in tolling is particularly strong here because the claim involves a capital eligibility challenge. See *Fahy* v. *Horn*, 240 F.3d 239, 245 (3d Cir. 2001) (holding that limitations should be applied more leniently in capital cases). Cf. *Souter* v. *Jones*, 395 F.3d 577, 599-602 (favoring equitable tolling

where claim involves actual innocence challenge) (6th Cir. 2005).

The extraordinary circumstances holding is not only inconsistent with the law of other federal appeals courts, but it also contradicts several TFR-specific holdings in the Fifth Circuit. See, e.g., *In re Wilson*, 442 F.3d at 878 (recognizing the TFR as an extraordinary circumstance that "reasonably caused [the petitioner] to delay filing a state habeas [petition]"); *In re Hearn*, 376 F.3d at 457 (finding the TFR to be an extraordinary circumstance because it "effectively forced [the petitioner] to choose between federal review of his pending writ petition and his right to pursue successive habeas relief under *Atkins*").[7]

The Fifth Circuit proposed that, instead of seeking the stay, Mr. Mathis should have withdrawn or withheld the claims in his initial petition, exhausted the *Atkins* claim, and recklessly bet that the pendency of the state MR proceedings would toll the separate limitations period for the non-MR claims. For the reasons set forth in REASONS FOR GRANTING RELIEF Section I.B, *supra*, such strategies would not have alleviated the Hobson's choice that the TFR,

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[7] When the Fifth Circuit has refused to treat the TFR as an extraordinary circumstance, the initial federal proceeding was not pending on the date the state *Atkins* petition was due—in other words, in instances when the TFR did not create a Hobson's choice. See, e.g., *In re Lewis*, 484 F.3d 793, 797-98 (5th Cir. 2007) (noting that direct review of the initial federal petition concluded before the June 20, 2003 deadline).

that the TFR, *Lundy*, and the limitations statute created.

C. Alternatively, The Fifth Circuit Erroneously Refused To Remand The Case To The District Court In Order To Decide Extraordinary Circumstances.

In determining that Mr. Mathis was not entitled to equitable tolling, the district court did not decide both prongs of the tolling inquiry; it found only that Mr. Mathis was not diligent—a finding that the Fifth Circuit reversed. See *Mathis* v. *Thaler*, 616 F.3d at 474. After oral argument on appeal, this Court decided *Holland*. 130 S.Ct. 2549. In light of *Holland*, Mr. Mathis requested that the Fifth Circuit remand the case for fact-finding on the timeliness question. App., *infra*, 229a-231a. As this Court did in *Holland*, the Fifth Circuit should have remanded the case for further inquiry on the extraordinary circumstances issue. See *Holland*, 130 S.Ct. at 2565.

Further fact-finding on equitable tolling is necessary for two reasons. First, entitlement to equitable tolling is inextricably intertwined with the merits of the MR claim, which remains unresolved. See *Hunter* v. *Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009) (per curiam) (holding that district court must hear evidence as to whether low IQ entitled petitioner to equitable tolling); *Rivera*, 505 F.3d at 355 ("[T]he merits blend inseparably into the question of equitable tolling here. * * * That is, answering whether [petitioner] is retarded is logically antecedent—if not a core element itself—to determining whether equitable tolling is available.").

Second, fact-finding is necessary to consider the import of a "Joint Advisory," proposed in early 2003 by the Director to known *Atkins* claimants. App, *infra*, 232a-234a. The Director, who now argues that Mr. Mathis could have safely withdrawn his non-MR claims, took exactly the opposite position in the proposed Joint Advisory:

> [T]he statue of limitations for raising a mental retardation claim based on [*Atkins*] will not run until June 20, 2003, one year after the date on which *Atkins* was decided. However, such a claim would be unexhausted and would subject [petitioner's] entire petition to dismissal without prejudice. *A dismissal of the petition in its entirety would time-bar [petitioner's] remaining claims and prevent him from re-raising [the non-MR claims] once he exhausted an* Atkins *claim.* Further, [petitioner] would be prohibited from prosecuting an *Atkins* claim in state court during the pendency of the instant proceeding because of the [TFR].

App., *infra*, 233a (internal citations omitted and emphasis added). Further fact-finding should have been conducted to determine whether equity should permit the Director to argue that Mr. Mathis could have safely pursued a strategy that the Director previously insisted would have forfeited his non-MR claims.

III. THE COURT SHOULD DECIDE WHETHER THE CONSTITUTION BARS THE APPLICATION OF § 2244 TO A PRISONER MAKING A PRIMA FACIE SHOWING OF MR.

The Suspension Clause provides that "[t]he Privilege of the Writ Habeas of Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The Fifth Circuit authorized Mr. Mathis to obtain a decision on the merits of his MR claim. See *In re Mathis*, 483 F.3d at 397. The district court, however, held that the petition was procedurally defective under § 2244. App., *infra*, 66a. The Court should decide whether, if an inmate made a prima facie showing of MR, imposing § 2244 procedural bars violates the Suspension Clause.

In *Felker* v. *Turpin*, 518 U.S. 651 (1996), the Court addressed a Suspension Clause challenge to AEDPA's new statutory restrictions on successive petitions. See *id.* at 663-64 (1996). Evaluating § 2244(b)(2) against the "complex and evolving body of equitable principles" governing successive petitions, the Court found no *facial* violation of the Suspension clause because the provision fell "well within the compass of this evolutionary process." *Id.* at 664. This Court has nonetheless suggested that an AEDPA restriction might be beyond the compass of that evolution as applied to an inmate who establishes that he is "actually innocent." See *In re Troy Davis*, 130 S. Ct. 1, 1-2 (2009) (Stevens, J., Concurring); see also *Whitley* v. *Senkowski*, 317 F.3d 223, 225 (2d Cir. 2003) (Calabresi, J.) (observing that

Suspension Clause may invalidate § 2244 procedural restrictions as to actual innocence claims); *Wyzykowski* v. *Dep't of Corr's.*, 226 F.3d 1213, 1218–19 (11th Cir. 2000) (finding that application of § 2244(d) to an actually-innocent claimant may violate the Suspension Clause and remanding for fact-finding); *In re Page*, 179 F.3d 1024, 1026 (7th Cir. 1999) (Posner, J.) (noting that § 2244(b) might run afoul of Suspension Clause).

This Court has held that the concept of "actual innocence" includes claims that a prisoner is "actually innocent of the death penalty"—that he is not eligible for capital sentencing. See *Dretke* v. *Haley*, 541 U.S. 386, 393 (2004); *Sawyer* v. *Whitley*, 505 U.S. 333, 347 (1992). Application of § 2244 procedural bars to capital eligibility claims presents the same constitutional problems created by applying § 2244 to claims that an inmate did not commit the crime for which (s)he was convicted. See *Henderson* v. *Thaler*, 2010 WL 4616876, at * 13 (5th Cir. Nov. 13, 2010) (Weiner, J., Dissenting) ("If we were to condone the barring of Henderson's *Atkins* claim by [§ 2244(d)], without ever affording him a federal opportunity to demonstrate his intellectual disability, then allowing the State to execute him would * * * be unconstitutional per se."); *Miller* v. *Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (acknowledging that limitations period may raise "serious constitutional questions" where procedural restriction is applied against one who is "actually innocent or incompetent [to be executed]"); *Martinez-Villareal* v. *Stewart*, 118 F.3d 628, 635 (9th Cir. 1997) (Nelson, J., Specially Concurring) (arguing that § 2244(b) violates the Suspension

Clause as to claims that a prisoner is not competent to be executed).

As *Felker* explains, Suspension Clause violations occur where procedural restrictions on successive petitions are beyond the "evolutionary compass" of the abuse-of-the-writ doctrine. See 518 U.S. at 664. Appling § 2244 procedural bars to prevent *any* federal *Atkins* review is beyond that evolutionary compass.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of
Appeals Fifth Circuit
FILED
August 20, 2010
Lyle W. Cayce
Clerk

No. 08-70021

MILTON WUZAEL MATHIS

Petitioner – Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent – Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In April 2007, pursuant to 28 U.S.C. § 2244(b)(3), this court permitted petitioner-appellant Milton Wunzael Mathis to file a successive federal habeas application asserting a claim based upon *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court case barring the execution of mentally retarded persons. The district court dismissed Mathis's successive federal habeas application on the grounds that: (1) Mathis failed to meet the requirements of 28 U.S.C. § 2244(b)(2); and (2) his petition was untimely and not entitled to equitable tolling. Because we find that Mathis's successive petition does not meet § 2244(b)(2)'s requirements, we AFFIRM.

I. BACKGROUND

In 1999, Mathis was convicted of capital murder and sentenced to death for the murders of Travis Brown and Daniel Hibbard.[1] The Texas Court of Criminal Appeals affirmed Mathis's conviction and sentence on direct appeal (which ran concurrent to his state habeas application) in February 2002. *Mathis v. State*, 67 S.W.3d 918 (Tex. Crim. App. 2002). On April 3, 2002, it adopted the trial court's findings of fact and conclusions of law and denied Mathis's first state habeas application.

Atkins was decided on June 20, 2002. On April 3, 2003, Mathis filed his first federal habeas application pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. In his federal habeas application, Mathis noted that he

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[1] The facts of the crime are described in one of our earlier opinions in this case. *In re Mathis*, 483 F.3d 395, 396 (5th Cir. 2007).

intended to file a successive state application alleging an *Atkins* violation but did not include the *Atkins* claim in his federal petition because it was not exhausted in state court as required under AEDPA. The federal petition was denied on the merits on February 2, 2004.

While his federal petition was pending, Mathis filed his second state habeas application, raising his *Atkins* claim for the first time, on June 20, 2003. On March 3, 2004, Mathis's second state habeas application was dismissed without prejudice because he had not shown that the federal court had stayed its proceedings as required by *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004).[2]

On February 17, 2004, Mathis submitted a "Motion for New Trial and for Abatement" in federal court, seeking reconsideration of his claims and asking the court to abate its decision pending completion of the proceedings for his second state habeas application. On March 9, 2004, the federal district court denied Mathis's motion. On March 19, 2004, Mathis moved for reconsideration of the March 9 order.[3] The

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[2] *Ex parte Soffar* permits Texas courts to consider a subsequent state habeas application "if the federal court with jurisdiction over a parallel writ enters an order staying its proceeding to allow the habeas applicant to pursue his unexhausted claims in Texas state court." 143 S.W.3d at 804. Before *Soffar*, Texas courts routinely dismissed subsequent state habeas applications if a federal petition was pending simultaneously, even if the federal court stayed its proceedings. *See Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972).

[3] On March 23, 2004, Mathis also filed a motion for reconsideration in the Texas Court of Criminal Appeals, asking the court to reinstate his second state habeas application (which

district court denied the motion on April 6, 2004, but, noting its desire to "preserve Mathis's ability to seek appellate review," construed his motion for reconsideration as a motion for an extension of time to file a notice of appeal. Mathis filed a notice of appeal in this court on April 8, 2004.

In August 2004, Mathis sought a COA and filed a motion to stay the proceedings to allow him to return to state court to raise his *Atkins* claim. While the request for COA and the motion to stay were pending before this court, the state court entered an order setting Mathis's execution for April 20, 2005. Mathis filed in this court a motion to stay the execution. This court denied the request for COA, the motion to stay the proceedings, and the motion to stay the execution on March 11, 2005. *Mathis v. Dretke*, 124 F.App'x 865, No. 04-70015, 2005 WL 580234 (5th Cir.) (unpublished), *cert. denied*, 545 U.S. 1131 (2005).

Mathis then filed his third state application for habeas relief, again raising his *Atkins* claim, and moved for stay of execution on April 15, 2005. The stay was granted on April 19, 2005, and the case was remanded to the state trial court for consideration of the *Atkins* claim. The state trial court held an evidentiary hearing in September 2005, and in January 2006 it recommended that Mathis be denied habeas relief. The Texas Court of Criminal Appeals adopted the trial court's findings and conclusions and denied relief on September 20, 2006. *Ex parte Mathis*, No.

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included his *Atkins* claim). The Texas Court of Criminal Appeals denied the motion on April 21, 2004.

WR-50772-03, 2006 WL 2706745 (Tex. Crim. App. Sept. 20, 2006).

On September 29, 2006, Mathis filed a motion in this court for authorization to file a successive habeas application pursuant to 28 U.S.C. § 2244(b)(3),[4] which was granted on April 2, 2007. *In re Mathis*, 483 F.3d 395 (5th Cir. 2007). Mathis filed his second federal application for habeas relief on April 4, 2007. Respondent filed a motion to dismiss the petition as time-barred or, in the alternative, a motion for summary judgment on the grounds that Mathis's *Atkins* claim failed on the merits.

On March 31, 2008, the district court dismissed Mathis's petition, holding that because he had not shown that his successive federal habeas application satisfied 28 U.S.C. § 2244(b)(2), the court had no jurisdiction to consider the application. Alternatively, the court held that Mathis had not complied with the AEDPA's one-year limitations period in filing his claim, and no basis for equitable tolling of the limitations period exists. The district court granted a COA. Mathis timely appealed.

II. SUCCESSIVE PETITIONS UNDER 28 U.S.C. § 2244(b)

Mathis first argues that the district court erred when it determined that his *Atkins* claim did not meet the requirements for successive petitions under 28 U.S.C. § 2244(b). The district court's dis-

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[4] The applicable provision reads, in relevant part, "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

missal of a second or successive § 2254 petition on the grounds that the motion fails to meet AEDPA's conditions is a legal conclusion we review de novo. *See Butler v. Cain*, 533 F.3d 314, 316 (5th Cir. 2008).

A. AEDPA Requirements for Successive Petitions

AEDPA provides that a claim presented in a second or successive habeas corpus application under 28 U.S.C. § 2254 that was not presented in a prior application shall be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(A)-(B); *Tyler v. Cain*, 533 U.S. 656, 662-63 (2001). Mathis bears the burden of demonstrating that his successive federal habeas application falls within one of the two exceptions and thus should not be dismissed. *See* 28 U.S.C. § 2244(b)(4); *Moore v. Dretke*, 369 F.3d 844, 846 n.1 (5th Cir. 2004).

B. "Previously Unavailable" Rule

Generally, Mathis relies on § 2244(b)(2)(A)—i.e., that the *Atkins* claim raised in his successive federal petition relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[5] There is no dispute that *Atkins* announced a new rule of constitutional law made retroactive to cases on collateral review, *see Morris v. Dretke*, 413 F.3d 484, 486-87 (5th Cir. 2005), or that Mathis's *Atkins* claim was raised for the first time in federal court in the instant successive habeas application. The issue before us is whether Mathis has demonstrated that his *Atkins* claim was "previously unavailable" at the time he filed his first federal habeas application. *See* 28 U.S.C. § 2244(b)(2); *see also In re Salazar*, 443 F.3d 430, 431-32 (5th Cir. 2006) (focusing on whether a claim "was available to [petitioner] when he filed his initial habeas application").

We have not previously considered this issue under the circumstances presented here. In cases before us where the applicant raises an *Atkins* claim for the first time in a successive federal habeas petition, the applicant has typically filed their federal petition *before Atkins* was decided, making the *Atkins* rule "previously unavailable" at the time of their first federal petition. *See, e.g., In re Wilson*, 442 F.3d

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[5] Before the district court, Mathis also asserted that because he is mentally retarded, he is no longer death eligible. The district court construed this claim as an argument pursuant to 28 U.S.C. § 2244(b)(2)(B)(ii), regarding facts underlying the claim. On appeal, he argues that his mental retardation should exempt him from AEDPA's strictures altogether or, at least, should toll the statute of limitations.

872, 876 (5th Cir. 2006); *In re Brown*, 457 F.3d 392, 396 (5th Cir. 2006). Here, it is undisputed that Mathis filed his first federal habeas petition in April 2003, *after Atkins* was decided in June 2002, yet the petition did not include an *Atkins* claim.

Respondent argues that, on these facts, the *Atkins* rule was not "previously unavailable" to Mathis at the time of his first federal habeas petition. At oral argument, counsel for Mathis asserted that no federal court adopts such a "formalistic" interpretation of "previously unavailable" as urged by Respondent. Two sister circuits have partially addressed this issue. *See In re Williams*, 364 F.3d 235, 239 (4th Cir.), *cert. denied*, 543 U.S. 999 (2004) (construing the term "previously" in §§ 2244(b)(2)(A) and 2244(b)(2)(B)(i), and holding that "constitutional rules that were established at the time of the applicant's last [pre-filing authorization] motion were not 'previously unavailable'"); *Bennett v. United States*, 119 F.3d 470, 472 (7th Cir. 1997) ("You cannot file a successive habeas corpus or section 2255 case on the basis of a claim that is not newly available."). Neither case, however, addressed *Atkins* claims or the particular circumstances raised in this case. We therefore decline to adopt Respondent's argument.

Moreover, Mathis advances two arguments to why his *Atkins* claim was previously unavailable. First, he argues that had he attempted to exhaust his *Atkins* claim in state court prior to filing his first federal habeas application, he risked forfeiting federal review of his previously exhausted claims be-

cause of the AEDPA statute of limitations.[6] Compounding the problem, in his view, is the Texas two-forum rule, which operated to prevent him from exhausting the claim in state court before timely pursuing federal relief. Second, he argues, if he had pursued his *Atkins* claim in a successive state habeas petition, he also risked forfeiting federal review of his exhausted claims because, under the law in effect at the time, it was unclear whether the successive state habeas petition would have tolled AEDPA's statute of limitations as to his exhausted claims. We consider both arguments in turn.

1. Exhaustion, Statute of Limitations, and the Texas Abstention Doctrine

Mathis is correct that his *Atkins* claim – in an initial or a successive federal habeas petition – is subject to AEDPA's exhaustion and statute of limitations requirements. *See In re Wilson*, 442 F.3d at 877-78; *Mathis*, 483 F.3d at 399. Under the AEDPA exhaustion doctrine, an applicant for federal habeas relief must first present his claims in state court before raising them in a federal habeas application. 28 U.S.C. § 2254(b)(1)(A). AEDPA also provides for a one-year limitations period to run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

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[6] The district court incorrectly stated Mathis's argument as follows: "Petitioner claims that he could not have filed his otherwise available *Atkins* claim in his first petition because he had not yet exhausted it."

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2244(d)(1).

Mathis was also subject to Texas's procedural rules regarding co-pending state and federal habeas applications. Prior to February 11, 2004, the Texas Court of Criminal Appeals dismissed any state habeas application without prejudice if the applicant had a parallel application arising from the same conviction pending in federal court, even if the federal court stayed its own proceeding. The doctrine was referred to as the abstention doctrine or "two-forum" rule. *See, e.g., Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972).

In this case, AEDPA's one-year limitations period for Mathis's first federal habeas petition began to run when his first state habeas application was denied on April 3, 2002. Mathis therefore had until April 3, 2003 to file a federal petition raising any

claims exhausted in the state habeas court. When the Supreme Court decided *Atkins* on June 20, 2002, Mathis had over nine months left in his AEDPA limitations period to file a federal habeas petition for his exhausted claims, but a full year remaining – until June 20, 2003 – to file a federal habeas petition for his *Atkins* claim. *See* 28 U.S.C. § 2244(d)(1)(C); *Rivera v. Quarterman*, 505 F.3d 349, 352 (5th Cir. 2007).

Further, the Texas abstention doctrine was in effect when Mathis filed his first federal petition in April 2003 and his second state application (raising his *Atkins* claim for the first time) in June 2003. Under the doctrine, the second state application was subject to dismissal without reaching the merits of – and therefore exhausting – Mathis's *Atkins* claim because the parallel federal habeas litigation was pending.

The district court listed Mathis's options in light of these procedural requirements:

> First, he could have filed an initial federal petition that included his exhausted claims and an *Atkins* challenge that would surely face problems because of section 2254(b)'s exhaustion requirements. Second, he could have sought relief in state court on his *Atkins* claim while litigating his exhausted claims in federal court, hoping to raise an *Atkins* issue in a successive federal petition. Finally, he could have exhausted his *Atkins* claim and then filed one comprehensive federal petition.

Mathis selected the second option.

Mathis's decision to file his federal habeas petition instead of exhausting his *Atkins* claim in state court is the impetus for his present conundrum. When *Atkins* was decided in June 2002, Mathis's only federal filing was his motion for appointment of counsel. Mathis's argument assumes that, for the purposes of the Texas two-forum rule, federal jurisdiction attached when he filed his first motion for appointment of counsel in April 2002, after his first state habeas petition was denied but before *Atkins* was decided. According to this argument, when the *Atkins* rule became available in June 2002, Mathis would not have been able to exhaust the claim in a successive state petition because, under the Texas two-forum rule, he already had a federal petition pending.

But Texas courts did not apply the two-forum rule to a state habeas petition unless the applicant filed the federal petition *before* seeking state relief. *See Soffar*, 143 S.W.3d at 807 (describing the history of the abstention doctrine, and stating, "[T]his Court has dismissed state habeas corpus writ applications when the applicant also has a writ *pending* in the federal courts that relates to the same conviction of same 'matter.'") (emphasis added). In June 2002, Mathis had not yet filed his federal petition; therefore he did not have "a writ pending in the federal courts." Mathis does not cite any authority to support the proposition that Texas courts considered a federal petition "pending" when the motion for appointment of counsel is filed.[7] In addition, Mathis's

[7] We note the Supreme Court's pre-AEDPA decision in *McFarland v. Scott*, 512 U.S. 849 (1994), in which the Court held that a capital defendant need not file a formal habeas corpus peti-

counsel, at oral argument, conceded that there is no Texas case in which the Texas Court of Criminal Appeals has dismissed a successive petition under the two-forum rule if the state petition is brought before a federal petition is filed. If Mathis had filed his successive state habeas application to exhaust his *Atkins* claim without filing a federal petition, he would not have been seeking relief in two forums simultaneously. Accordingly, the two-forum rule would not have prevented him from exhausting his *Atkins* claim in state court.[8]

We recognize that Mathis faced conflicting choices when deciding whether and how to pursue habeas relief. As the district court correctly noted, "Had [Mathis] filed his *Atkins* claim in his initial [federal] petition, the rule in *Rose v. Lundy*, 455 U.S. 509 (1982), mandated that it was subject to dismissal as a 'mixed petition,' that is, one raising both exhausted and unexhausted claims." Yet we have also said that *Lundy* "would have little meaning if it

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tion in order to establish a district court's jurisdiction to enter a stay of execution. In that case, however, the Court was interpreting 21 U.S.C. § 848(q)(4)(B), which provides for qualified legal representation in federal habeas proceedings, and held that the right to counsel adheres prior to filing a formal habeas petition. 512 U.S. at 854-57. In contrast, here we examine a very different question under a different legal framework: when, for the purposes of the Texas abstention doctrine, Texas courts deemed a federal petition "pending."

[8] In addition, the two-forum rule was modified on Febru 11, 2004, when the Texas Court of Criminal Appeals decided to permit consideration of a subsequent state writ "if the federal court having jurisdiction over a parallel writ enters an order staying all of its proceeding for the applicant to return to the appropriate Texas court to exhaust his state remedies." *Soffar*, 143 S.W.3d at 807.

could be avoided by withholding unexhausted claims." *Crone v. Cockrell*, 324 F.3d 833, 838 (5th Cir. 2003). If Mathis had included his unexhausted *Atkins* claim in his first federal petition, he – and petitioners in like circumstances – had options available: "They may withdraw a mixed petition[i.e., one containing exhausted and unexhausted claims], exhaust the remaining claims, and return to district court with a fully exhausted petition. . . . [I]n such circumstances the later filed petition would not be 'second or successive.'" *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (citing *Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000)). In that case, Mathis could have withdrawn his first federal petition and would not have been subject to AEDPA's successive petition requirements when he returned to federal court after exhausting the *Atkins* claim.

Mathis's predicament was further aggravated because he filed his federal petition on the last day of the AEDPA limitations period, failed to attempt to exhaust his *Atkins* claim before doing so, *and* failed to include the claim even though it relied on a constitutional rule in effect for at least nine months before he filed the petition.[9]

Accordingly, we hold that Mathis's habeas litigation strategy choice to withhold an *Atkins* claim

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[9] We note that Congress determined that a one-year limitations period was reasonable for federal habeas petitioners. *See* 141 CONG. REC. S7803-05, S7877 (1995) (approving one-year limitations period to curb abuse of the writ of habeas corpus). In this case, Mathis's decision to file on the last day of the AEDPA limitations period, combined with his failure to attempt exhaustion *and* his failure to include the *Atkins* claim in the federal petition, contributed to his present procedural quagmire.

from the initial federal petition, while simultaneously acting so late as to preclude exploration of other relief, did not make the *Atkins* rule "previously unavailable" to him within the meaning of § 2244(b)(2)(A).

2. Successive State Habeas Petitions and Statutory Tolling

In his second argument, Mathis urges that if he had pursued his *Atkins* claim in a successive state habeas petition before filing his first federal habeas petition, he also risked forfeiting federal review of his exhausted claims because the law was not clear at the time of his first federal habeas petition as to whether the AEDPA statute of limitations would have been tolled on his exhausted claims.

Under AEDPA's timeliness requirements, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). The tolling provision does not state expressly whether the limitations period is tolled as to exhausted claims while a petitioner seeks state habeas relief as to new claims. Rather, "the express language of section § 2244(d)(2) makes clear that tolling is appropriate, without regard to the nature of the claims in the state pleading, as long as the state application challenged 'the pertinent judgment.'" R. HERTZ & J. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.2b n.56 (5th ed. 2005).

Mathis urges this court to look to the "unsettled" law in effect in 2002 – when *Atkins* was decided

– to determine whether his successive state habeas petition would have been deemed "properly filed" within the meaning of § 2244(d)(2) such that the AEDPA statute of limitations would be tolled. But the cases governing our circuit at the time are not helpful to his argument. At the time, the law of our circuit included *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999), where we held that a successive state habeas application was "properly filed" under § 2244(d)(2), even though it had been dismissed as an abuse of the writ under Texas law,[10] and therefore tolled the AEDPA limitations period. After Villegas's successive state application was dismissed as an abuse of the writ, he filed a federal habeas application; the state moved to dismiss as time-barred. 184 F.3d at 468. The district court rejected the petitioner's tolling argument, and held that the petition was not "properly filed" within the meaning of § 2244(d)(2). *Id.* We held that "a properly filed application' for § 2244(d)(2) purposes is one that conforms with a state's applicable procedural filing requirements." *Id.* at 470. We defined "procedural filing requirements" as "prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review," such as rules governing notice and time, and also "a requirement that the petitioner obtain judicial authorization for the filing." *Id.* at 470 n.2. We also noted that Texas sought to "discourage successive petitions by limiting the ability the availability of re-

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[10] During the relevant time period, Article 11.07 of the Texas Code of Criminal Procedure precluded a grant of relief based on a successive petition unless the petitioner demonstrated facts sufficient to fit within a statutory exception allowing relief. TEX. CODE CRIM. PROC. art. 11.07 § 4(a) (West 1999).

lief" – for example, by permitting the filing of a successive petition but then requiring judicial consideration of the application to determine whether sufficient facts were alleged for the court to address the merits of the claims. *Id.* at 472 n.3.

Moreover, soon after *Villegas*, the Supreme Court held that, for the purposes of § 2244(d)(2), "[a]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (citing *Villegas*, 184 F.3d at 469-70, *inter alia*). The *Artuz* Court distinguished conditions to pre-filing (for example, time limits or form of the document) from conditions to obtaining relief: "[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar." *Id.* In other words, as a later Court decision noted, "state procedural bars 'prescribing a rule of decision for a court' confronted with certain claims previously adjudicated or not properly presented are not 'filing' conditions." *Pace v. Diguglielmo*, 544 U.S. 408, 417 (2005) (citing *Artuz*, 531 U.S. at 10-11).[11]

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[11] Mathis argues that *Pace* abrogated *Villegas*, citing *Wardlaw v. Cain*, 541 F.3d 275 (5th Cir. 2008). Although we held in *Wardlaw* that *Pace* had abrogated *Smith v. Ward*, 209 F.3d 383 (5th Cir. 2000), *Pace* did not affect *Villegas*. *See Wardlaw*, 541 F.3d at 279. The cases of *Ward*, *Pace*, and *Wardlaw* involved petitioners whose applications had been dismissed as untimely, and "time limits, no matter their form, are 'filing' conditions." *Pace*, 544 U.S. at 417. But *Pace* only affirmed the "obvious distinction between time limits, which go to the very initiation of a petition . . . and the type of 'rule of decision' procedural bars at issue in *Artuz*, which go to the ability to obtain relief." *Id.* In

In this case, Mathis's successive state habeas petition would have been "properly filed" under *Artuz* and *Villegas* even if it had been dismissed as an abuse of the writ under Texas's capital habeas statute. Like the non-capital habeas statute in *Villegas*, the Texas capital habeas statute provided that a court could not consider a subsequent state habeas application unless the application contained specific facts establishing that the claims presented could not have been presented in a previous application because the legal or factual basis was not available at the time of the previous application. TEX. CODE CRIM. PROC. art. 11.071 § 5(a) (West 1999). If the Texas Court of Criminal Appeals had determined that the requirements of section 5(a) were not met, the court would have dismissed the application as an abuse of the writ. *Id.* § 5(c). Under *Artuz*, these provisions are conditions to obtaining relief, not filing conditions. 531 U.S. at 10-11. Therefore, Mathis's successive state petition, even if dismissed as an abuse of the writ, would be deemed "properly filed" such that the AEDPA statute of limitations would have tolled while it was pending in state court.[12] *See id.*

Villegas, 184 F.3d at 473, we held that an application dismissed as an abuse of the writ – a classic "procedural bar" – was nevertheless "properly filed" within the meaning of § 2244(d)(2). That decision is wholly consistent with *Pace*. Because Article 11.071 § 5 is substantially identical to Article 11.07 § 4, *Villegas* controls here.

[12] Mathis appears to argue that there is a statutory time limitation on all habeas applications (initial or successive) under Article 11.071 such that his petition would have not been deemed "properly filed" for AEDPA tolling purposes. The limits in section 4 of the Texas capital habeas statute do not state whether they are applicable to initial or subsequent habeas applications. *See* TEX. CODE CRIM. PROC. art. 11.071 § 4(a) (West

The law of this circuit was sufficiently clear as to whether a successive state petition would have tolled the AEDPA statute of limitations. Mathis offers no cogent argument to excuse his failure to include his *Atkins* claim in his first federal petition when that claim was available to him for nine months after *Atkins* was decided. Because the claim was available, we hold that he has not made the requisite showing under § 2244(b)(2)(A).

1999) ("An application for a writ of habeas corpus . . . must be filed in the convicting court not later than the 180th day" after appointment of counsel or "not later than the 45th day" after the state's original brief is filed on direct appeal, "whichever date is later."). However, at least one Texas court has held that the time limitations of section 4 are applicable solely to initial petitions. *See Ex parte Reedy*, 282 S.W.3d 492, 495 n.6 (Tex. Crim. App. 2009) (citing § 4(e) of article 11.071 for the proposition that "failure to timely file *initial* post-conviction application for writ of habeas corpus constitutes a wavier of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed") (emphasis added, internal quotation marks omitted). The latter interpretation is reasonable: the initial petition is filed in the convicting court and the time limits are tied to proceedings in the convicting court. In contrast, capital successive state petitions are returnable to the Texas Court of Criminal Appeals, who decides in the first instance whether the petition meets threshold requirements before it can be considered on the merits by the convicting court. *See* TEX. CODE CRIM. PROC. art. 11.071 § 5. Mathis's case clearly plays this out – his third state habeas petition was filed in April 2005, nearly six years after his conviction became final, yet was not dismissed as untimely. Moreover, the Texas Court of Criminal Appeals held that the petition met the requirements of section 5 because the *Atkins* claim presented therein was not previously available to Mathis when he filed his first state petition.

III. TIMELINESS

The district court also held that, assuming Mathis's successive federal petition complied with § 2244(b)(2), the petition did not comply with § 2244(d)(1), AEDPA's one-year limitations period. We review de novo an order dismissing a habeas petition as time-barred under AEDPA. *Starns v. Andrews*, 524 F.3d 612, 617 (5th Cir. 2008).

A. AEDPA Statute of Limitations

First, we examine whether Mathis's successive federal habeas application raising an *Atkins* claim was timely under AEDPA. AEDPA's one-year limitations period for Mathis's federal habeas petition raising an *Atkins* claim began to run on June 20, 2002, when *Atkins* was decided. *See* § 2244(d)(1)(C); *Rivera v. Quarterman*, 505 F.3d 349, 352 (5th Cir. 2007). Mathis therefore had until June 20, 2003 to file a federal habeas petition for his unexhausted *Atkins* claim.

As we noted, Mathis filed his first federal petition on April 3, 2003, without raising his *Atkins* claim. The federal habeas petition did not toll the AEDPA statute of limitations. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

Mathis's successive state petition raising his *Atkins* claim, however, tolled the one-year statute of limitations. § 2244(d)(2). Therefore, the limitations period tolled from June 20, 2003 until April 22, 2004, the day after the Texas Court of Criminal Appeals denied Mathis's motion for reconsideration of its denial of his second state petition. *See Windland v. Quarterman*, 578 F.3d 314, 317 (5th Cir. 2009) ("Applying the plain language of the statute, we hold that

a state petition for habeas relief is 'pending' for AEDPA tolling purposes on the day it is filed through (and including) the day it is resolved.").

But Mathis filed the state petition on June 20, 2003, the last day of the AEDPA limitations period for his *Atkins* claim. He thus had only one day left in his AEDPA limitations period, making his successive federal petition raising an *Atkins* claim due on April 23, 2004. Instead, Mathis's successive federal petition currently before us was filed well past the deadline. Accordingly, the successive federal petition is time-barred unless Mathis can establish that he is entitled to equitable tolling.

B. Equitable Tolling

Mathis argues that, even if his successive petition is untimely, the district court erred when it denied equitable tolling to his *Atkins* claim, because (1) it failed to consider his dilemma created by the Texas two-forum rule and (2) he should be entitled to equitable tolling based upon his mental retardation.[13] The district court's decision regarding equitable tolling of AEDPA's statute of limitations is reviewed for abuse of discretion. *Stone v. Thaler*, – F.3d – 2010 WL 3034809, at *1 (5th Cir. Aug. 5, 2010).[14] Nonetheless, "[w]e must be cautious not to apply the statute of limitations too harshly." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999).

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[13] Mathis argued to the district court that he was unable to pursue his *Atkins* claim in state court because Texas did not appoint him an attorney immediately after *Atkins* was decided. He does not raise this argument on appeal.

[14] *But see Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (noting that de novo review applies where district court denies equitable tolling as a matter of law).

Recently, the Supreme Court confirmed the holding of this and other circuits that AEDPA's one-year statute of limitations is not jurisdictional and may be equitably tolled. *Holland v. Florida*, 130 S. Ct. 2549, 2561 (2010). A habeas petitioner is entitled to equitable tolling only if he shows "'(1) that he ha[d] been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* at 2562 (quoting *Pace*, 544 U.S. at 418). "Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002).

1. Diligence

We have stated that "'[e]quity is not intended for those who sleep on their rights.'" *In re Wilson*, 442 F.3d at 875 (quoting *Fisher*, 174 F.3d at 715). The diligence required for equitable tolling purposes, however, is "'reasonable diligence,' not 'maximum feasible diligence.'" *Holland*, 130 S. Ct. at 2565 (quoting *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996) and *Starns*, 524 F.3d at 618).

Based on our review of the record, Mathis exhibited a pattern of diligently pursuing his rights in state and federal court, despite procedural difficulties. Mathis filed his first federal habeas petition in an attempt to pursue relief on his exhausted claims in April 2003. In June 2003, his appointed federal counsel filed the second state habeas application asserting *Atkins*, even though it was ultimately futile because of the Texas two-forum rule. When the two-forum rule was modified in *Soffar*, Mathis immediately acted to preserve his state *Atkins* claim by re-

questing a stay and abeyance from the district court. Mathis not only continued to pursue relief from the district court, by filing motions for reconsideration and appealing the denial thereof, he also moved – albeit unsuccessfully – for reconsideration in the Texas state court of the denial of his second state habeas petition. Once the state issued an order of execution in January 2005, Mathis's focus shifted to staying the execution. As soon as his motion to stay execution was denied, Mathis filed his third state petition including his *Atkins* claim in April 2005, just days before his scheduled execution. When the third state application was denied on the merits, Mathis filed his motion for authorization with this court within one week of the state court's order of denial. He also filed his successive federal petition within two days of this court's grant of authorization.

Far from sleeping on his rights, Mathis sought relief in multiple tribunals in an effort to raise his *Atkins* claim. Under the circumstances, Mathis's actions were more than reasonably diligent. *See Holland*, 130 S. Ct. at 2562.

2. Extraordinary Circumstances

Although Mathis makes colorable arguments to demonstrate diligence, he must also show "that some extraordinary circumstance stood in his way and prevented timely filing." *Id.*

"The doctrine of equitable tolling is applied restrictively and, as we have held repeatedly, is entertained only in cases presenting 'rare and exceptional circumstances where it is necessary to preserve a plaintiff's claims when strict application of the statute of limitations would be inequitable.'" *In*

re Wilson, 442 F.3d at 875 (quoting *Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002)).[15]

Mathis argues that the Texas two-forum rule presents the "rare and exceptional circumstance" sufficient to warrant equitable tolling. We have addressed this argument in a similar context. *See, e.g.*, *In re Wilson*, 442 F.3d at 875-78; *In re Hearn*, 376 F.3d 447, 455-57 (5th Cir. 2004). In *In re Wilson*, Wilson's initial federal habeas proceeding was still pending before this court, which prevented him from timely filing his subsequent state habeas petition to exhaust his *Atkins* claim. 442 F.3d at 874. We considered his untimely successive habeas application and concluded that "the Texas two-forum rule reasonably caused [Wilson] to delay filing a state habeas [petition] leaving himself only one day after the state court ruling to obtain authorization and file a federal

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[15] We have applied equitable tolling where the district court has done something to mislead the petitioner into believing that his petition is due after the limitations period has expired. *Compare Prieto v. Quarterman*, 456 F.3d 511, 514-15 (5th Cir. 2006) (equitable tolling applied where petitioner requested and received extension of time from district court before deadline to file habeas petition and relied in good faith on that extension) *and United States v. Patterson*, 211 F.3d 927, 931-32 (5th Cir. 2000) (applying equitable tolling where district court granted *pro se* prisoner's request to dismiss petition without prejudice so that prisoner could retain counsel and refile petition later), with *Fierro*, 294 F.3d at 682-84 (refusing to apply equitable tolling where district court issued scheduling order at government's request setting deadline for habeas petition outside limitations period, because the scheduling order was requested and issued after the limitations period had expired and thus neither the request nor the order could have contributed to Fierro's failure to file within the limitations period). Mathis has presented no evidence here that he was somehow misled by the representations of the district court or of this court.

habeas petition." *Id.* at 878. We therefore held that Wilson demonstrated "rare and extraordinary circumstances that justify equitable tolling of the limitations period." *Id.* And in *In re Hearn*, we considered an untimely successive habeas application brought by a *pro se* prisoner whose counsel had withdrawn representation upon denial of his first federal habeas petition. 376 F.3d at 454. We concluded that Texas's habeas abstention procedure *and* the unavailability of qualified habeas counsel after the disposition of his initial petition denied Hearn an opportunity to sufficiently investigate his *Atkins* claim. *Id.* Accordingly, we held that equitable tolling was appropriate. *Id.* at 456-57.[16]

In both cases, the procedural posture and some other circumstance outside the petitioner's control, in addition to the Texas two-forum rule, warranted equitable tolling. Wilson and Hearn's initial federal habeas petitions were either filed or pending appeal when *Atkins* was decided; the *Atkins* claim could not be raised before or during federal review; and each petitioner would be faced with procedural hurdles to raising the claim subsequently in state or federal court. In contrast, *Atkins* was decided nine months before Mathis filed his first federal habeas petition. While the Texas two-forum rule heavily influenced Mathis's litigation strategy, it did not pre-

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[16] On petition for rehearing, we limited our opinion to cases in which the petitioner lacks counsel, but reiterated that equitable tolling applied "because of the combination of the problem created by the Texas two-forum rule . . . *and* the withdrawal of petitioner's counsel." *In re Hearn*, 389 F.3d 122, 123 (5th Cir. 2004) (emphasis added).

sent the same "Hobson's choice" as present in *Wilson* and *Hearn*. 442 F.3d at 878.

Instead, Mathis's case is similar to *In re Lewis*, where the petitioner waited until the last day of the one-year limitations period to file his successive habeas application in federal court . 484 F.3d 793, 795 (5th Cir. 2007). Lewis then argued that the Texas two-forum rule precluded him from timely filing his federal petition raising an *Atkins* claim. *Id.* at 797. We concluded that while the Texas two-forum rule "temporarily postponed" Lewis's ability to file his *Atkins* claim in state court, it did not prevent him from filing his *Atkins* claim in state court within the one-year period. *Id.* at 797-98. As with Lewis, the Texas two-forum rule did not prevent Mathis from pursuing habeas relief on his *Atkins* claim within the statute of limitations. *Atkins* was available to Mathis for nine months before he pursued the claim in state court. Based on the facts of Mathis's case, the Texas two-forum rule does not present the rare and extraordinary circumstance sufficient to warrant equitable tolling.

Accordingly, we hold that Mathis is not entitled to equitable tolling, and the district court did not abuse its discretion in refusing to grant equitable tolling.

IV. CONCLUSION

We hold that Mathis's successive federal habeas petition did not meet the standard under 28 U.S.C. § 2244(b)(2)(A) and therefore must be dismissed. Even if the petition met the standard, we hold that the petition was time-barred under AEDPA's statute of limitations, and the district court

did not abuse its discretion when it denied equitable tolling.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MILTON WUZAEL MATHIS,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-07-CV-
	§	1142
	§	
NATHANIEL QUARTERMAN, Director, Correctional Institutions Division, Texas Department of Criminal Justice,	§	
Respondent.	§	

ORDER

On March 31, 2007, this Court dismissed the federal habeas petition filed by Milton Wuzael Mathis ("Petitioner") in which he claimed that mental retardation precludes his execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). (Docket Entry No. 20). Two procedural defects caused the Court to dismiss the case: (1) Petitioner did not meet 28 U.S.C. § 2244(b)'s demanding requirements for filing second or successive petitions and (2) Petitioner filed his *Atkins* claim late under 28 U.S.C. § 2244(d) and without sufficient justification for its tardiness. In the alternative, the Court reviewed the record, pleadings, and state court opinion and noted that Peti-

tioner's claim did not merit federal habeas relief.

Petitioner has now filed two post-judgment motions. First, Petitioner asks this Court under FED. R. CIV. PRO. 59(e) to "amend and vacate portions of the memorandum and judgment," specifically those addressing "the applicability of equitable tolling or the merits of the underlying claim." (Docket Entry No. 22 at 1, 4). Petitioner argues that, once this Court found that 28 U.S.C. § 2244(b) did not authorize the filing of a successive petition, no jurisdiction existed for additional review. Second, Petitioner asks under FED. R. CIV. PRO. 60(b) for this Court to reconsider the merits of his habeas petition. (Docket Entry No. 23). Arguing that he received an insufficient opportunity to brief the issues before dismissal, Petitioner extensively discusses the merits of his *Atkins* claim.

Petitioner asserts that, once it becomes apparent that the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") does not authorize the filing of a successive petition, a federal court cannot reach alternative grounds for dismissal. Petitioner has not shown any authority holding that noncompliance with the AEDPA's successive petition requirements precludes the recognition of other grounds for dismissal. This Court's alternative dismissal of Petitioner's action for noncompliance with the AEDPA's limitations period only follows cases where the Fifth Circuit Court of Appeals has looked at the timeliness of a habeas petition before finding that 28 U.S.C. § 2244(b) authorizes full review. *See, e.g., In re Lewis*, 484 F.3d 793, 796 (5th Cir. 2007); *In re Salazar*, 443 F.3d 430, 434 n.2 (5th Cir. 2006); *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006); *In re Elizalde*, No. 06-

20072 (5th Cir. Jan. 31, 2006). Section 2244 requires a court to dismiss any claim that does not meet the specific successiveness conditions, but does not expressly limit a court's ability to dismiss a habeas action on alternative grounds. The Court will not disturb the holding that Petitioner has not shown that he is entitled to equitable tolling of his time-barred habeas petition.

Petitioner also asks this Court to reevaluate its alternative merits review of his *Atkins* claim. In doing so, however, Petitioner makes paradoxical arguments. One on hand, Petitioner argues that the Court lost jurisdiction to review his *Atkins* claim when it became clear that he could not file a successive petition. On the other hand, Petitioner asks this Court to reopen the proceedings so that he can brief the merits further. The Court finds that procedural error prevents the Court's ability to grant relief on his *Atkins* claim. Petitioner failed to show either that his claim was not previously available under 28 U.S.C. § 2244(b)(2)(A) or that the Court erred in refusing to equitably toll the AEDPA's limitations period. The Court does find, however, that the procedural findings raise a question as to whether the Court should have exercised jurisdiction over the merits of the *Atkins* claim. Accordingly, the Court **GRANTS IN PART** Petitioner's motion to vacate (**Docket Entry No. 22**). The Court will vacate that portion of the Memorandum and Order (Section IV) that addresses the merits of Petitioner's *Atkins* claim. The Court **DENIES** Petitioner's motion for reconsideration **AS MOOT**. (**Docket Entry No. 23**).

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 23rd day of April, 2008, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MILTON WUZAEL MATHIS,	§	
Petitioner,	§	
	§	
v.	§	CIVIL NO. H-07-CV-1142
	§	
NATHANIEL QUARTERMAN, Director, Correctional Institutions Division, Texas Department of Criminal Justice,	§	
Respondent.	§	

MEMORANDUM AND ORDER

This Court previously considered and denied a federal habeas petition filed by Milton Wuzael Mathis ("Petitioner") in Cause No. H-03-cv-1138. Petitioner is a capital inmate convicted in Texas and sentenced to death. In the pending case, Petitioner has filed a successive federal habeas petition under 28 U.S.C. § 2254 arguing that mental retardation exempts him from execution. The Court has analyzed this successive petition under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") which strictly limits a petitioner's ability to file a successive habeas action. After a thorough review of the record,

pleadings, and the law, this Court issues the following opinion.

I. Background

This case focuses on the interplay between the AEDPA's one-year limitations period, its strict exhaustion requirement, and its successive-petition provisions. In this successive petition, Petitioner has raised a claim that he is exempt from execution because he is mentally retarded. Petitioner's ability to file a successive petition depends on when the mental retardation claim became available to him and how diligently he pursued that claim. Resolving the procedural issues in this case requires a detailed review of Petitioner's litigation history.

A. Petitioner's First Round of State Proceedings

In 1999, a jury convicted Petitioner of capital murder and answered Texas' special issues questions in a manner authorizing a death sentence. The Texas Court of Criminal Appeals denied Petitioner's direct appeal on February 13, 2002. *See Mathis v. State*, 67 S.W.3d 918 (Tex. Crim. App. 2002). Under 28 U.S.C. § 2244(d)(1), an inmate has one year to file a federal habeas petition after his criminal judgment becomes final on direct appeal. The conclusion of Petitioner's direct review triggered the beginning of the AEDPA's limitations period. The AEDPA, however, allows a "properly filed application for State post-conviction or other collateral review" to toll that limitations period. 28 U.S.C. § 2244(d)(2). Petitioner's initial state habeas action ran concurrent to his direct appeal. Accordingly, Petitioner had one full year from when the Court of Criminal Appeals denied habeas relief

on April 3, 2002, to file a federal petition. *Ex parte Milton Wuzael Mathis*, No. 50,772-01 (Tex. Crim. App. Apr. 3, 2002) (unpublished).

This Court appointed federal counsel on April 29, 2002. (*Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 2). Developments shortly thereafter forced Petitioner to have to make choices about his post-conviction remedies.

B. Atkins v. Virginia

On June 20, 2002, the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), found that the Eighth Amendment barred the execution of mentally retarded defendants. At that point, two potential deadlines existed for Petitioner's future federal litigation. Petitioner needed to file a federal habeas petition by April 3, 2003, unless additional state action tolled the AEDPA limitations period. However, because the AEDPA allowed petitioners to seek federal review within a year from "the date on which the constitutional right asserted was initially recognized by the Supreme Court," 28 U.S.C. § 2254(d)(C). Petitioner had until June 20, 2003, to advance any *Atkins* claim. *See Rivera v. Quarterman*, 505 F.3d 349, 352 (5th Cir. 2007) ("June 20, 2003 ... was the last day to bring an *Atkins* claim under AEDPA's one-year statute of limitations period."); *In re Salazar*, 443 F.3d 430, 434 N.2 (5th Cir. 2006) ("The Supreme Court issued its decision in *Atkins* on June 20, 2002, therefore, the AEDPA limitations period expired on June 20, 2003[.]"). State habeas proceedings would also toll the limitations period for any *Atkins* claim.

The reconciliation of these two filing dates is essential to the issues before the Court. When the

Supreme Court issued the *Atkins* opinion Petitioner had three options if he wished to advance in federal court his already exhausted issues and any *Atkins* claim. First, he could have filed an initial federal petition that included his exhausted claims and an *Atkins* challenge that would surely face problems because of section 2254(b)'s exhaustion requirements. Second, he could have sought relief in state court on his *Atkins* claim while litigating his exhausted claims in federal court, hoping to raise an *Atkins* issue in a successive federal petition. Finally, he could have exhausted his *Atkins* claim and then filed one comprehensive federal petition.

The AEDPA encourages a petitioner to file all available claims in his initial habeas petition, making the third option preferable and free from the procedural snarls inherent in the other options. Petitioner, however, chose the second option. Petitioner filed a federal habeas petition on April 3, 2003, the last day possible to raise claims he exhausted in his initial state proceedings. His initial federal petition did not assert an *Atkins* claim, though he advised the Court that he was "planning to file a second state habeas application based on *Atkins*." (*Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 3 at 27).

On June 20, 2003, two-and-a-half months after filing his initial federal petition and on the last day remaining to raise *Atkins* claims, Petitioner filed a successive state habeas application claiming that he was retarded. The AEDPA's limitations period would be tolled by that pleading under 28 U.S.C. § 2244(d)(2).

Respondent filed a motion for summary judgment on Petitioner's initial federal petition. In his October 14, 2003 response, Petitioner first informed the Court that he was pursuing state relief on an *Atkins* claim. Petitioner did not ask this Court to hold his federal action in abeyance while he litigated his *Atkins* claim in state court. On February 2, 2004, this Court entered summary judgment in Respondent's favor and denied Petitioner's federal petition. This Court recognized that no *Atkins* claim had yet been presented in federal court and that federal habeas statutes would constrain any future attempt to raise an *Atkins* claim:

> One June 20, 2002, the Supreme Court held that a State cannot execute a prisoner who is mentally retarded. *See Atkins v. Virginia*, 536 U.S. 304 (2002). While the operative facts and legal precedent were presumably available to him, Petitioner's federal petition filed on April 3, 2003, did not allege that he would be exempt from execution because of his alleged retardation, nor did it indicate that he intended to seek state relief on that basis. Only in his response to the summary judgment motion filed on October 14, 2003, does Petitioner inform the Court that he has recently filed a successive state habeas application raising an *Atkins* claim. No *Atkins* claim is before this Court. After the state courts adjudicate Petitioner's *Atkins* claim, he may not present that claim in federal court, provided that he complies with the relevant procedural requirements governing federal habeas review. At this time, Petitioner has not presented the fed-

> federal courts with any issue based on his mental state that would impede his execution.

(*Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 17 at 45).

C. Texas' Two-Forum Rule

When this Court denied Petitioner's petition, his successive state application was still pending. Changes in Texas procedure, however, soon changed that viability of that action. Texas had long employed a two-forum rule (also called the "*Powers* doctrine" and the "habeas abstention doctrine") under which the Texas courts declined to exert state habeas jurisdiction when the federal courts had a parallel petition under consideration. *See Ex parte Green*, 548 S.W.2d 914, 916 (Tex. Crim. App. 1977) ("A petitioner must decide which forum he will proceed in, because [the Texas Court of Criminal Appeals] will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction over the same matter."). Though not a jurisdictional limitation, the Texas courts rooted the two-forum rule in principles of comity. *See Carter v. Estelle*, 677 F.2d 427, 436 (5th Cir. 1982). With changes in federal procedure, most notably the AEDPA's limitation period and the successive petition restrictions, the two-forum rule presented difficult procedural challenges for inmates. Petitioners could attempt to comply with the AEDPA time constraints by filing unexhausted claims, but then find that they could not exhaust them concurrently in state court and that a federal dismissal would expend their remaining limitations period. On February 11, 2004, the Court of Criminal Appeals decided *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App.

2003), a case that modified Texas' previous reluctance to consider a state habeas action while a habeas petition was pending in federal court. In *Soffar*, the Court of Criminal Appeals held that the Texas courts could relax the two-forum rule, but only when the federal courts stayed a parallel federal action.

On February 19, 2004, Petitioner filed a timely motion under FED. R. CIV. P. Rule 59(e) seeking to alter or amend judgment on his first federal petition. For the first time, Petitioner asked this Court to stay and abate his federal proceedings to allow unfettered state consideration of his *Atkins* claim. (*Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 19). In his Rule 59(e) motion, Petitioner conceded that "the *Atkins* decision and a factual foundation for a claim were available when the Section 2254 petition was filed[.]" (*Mathis v. Dretke*, 03-cv-1136, Docket Entry No. 19 at 19). Petitioner, however, did not ask this Court to reopen his proceedings so that he could amend his federal petition to include an *Atkins* claim. Petitioner wanted this Court to stay what remained of his federal proceedings so that, under *Soffar*, Texas' two-forum rule would not thwart state review.

The Court denied his Rule 59(e) motion on March 9, 2004, because the Court had no jurisdiction over Petitioner's unadjudicated *Atkins* claim and because of uncertainty about the scope of Texas's *Soffar* opinion. (*Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 20). Petitioner had not informed the Court that on March 3, 2004, the Court of Criminal Appeals dismissed his successive state habeas application because of his active federal proceedings. On March 19, 2004, Petitioner asked this Court to reconsider its order refusing to abate his federal proceedings.

(*Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 23). Finding nothing left to say, this Court denied his motion for reconsideration on April 6, 2004. (*Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 23). This Court, however, noted that Petitioner could ask the Fifth Circuit to stay his appeal to allow state review under Texas' new *Soffar* procedure.

On March 23, 2004, Petitioner filed a motion for reconsideration in the Texas Court of Criminal Appeals asking the court to reinstate his second state habeas application containing his *Atkins* claim. The Court of Criminal Appeals denied that motion on April 24, 2004.

Petitioner filed a federal notice of appeal on April 8, 2004. Petitioner did not ask the Fifth Circuit to stay his appeal to comply with *Soffar*, even when his motion for reconsideration remained pending in the Court of Criminal Appeals. Petitioner's federal appeal, however, challenged this Court's refusal to stay federal proceedings after the entry of judgment. During the pendency of his appeal, the State of Texas set Petitioner's execution for April 20, 2005. Petitioner asked the Fifth Circuit to stay his execution.

On March 11, 2005, the Fifth Circuit refused to certify any issue for appeal and did not stay Petitioner's execution. The Fifth Circuit held that this Court did not err in refusing to issue a stay after the entry of judgment:

> Because Petitioner submitted his motion to stay proceedings after the final judgment dismissing his habeas petition, the district court concluded that the only matter left for it to stay was the time to file a notice of appeal. The

> district court held that it did not have the power to extend the time to file a notice of appeal indefinitely. We agree. Notwithstanding Petitioner's status as a prisoner, a federal habeas proceeding is a civil proceeding. *Wilkens v. Johnson*, 238 F.3d 328, 330 (5th Cir. 2001), therefore, it is subject to Rule 4(a) of the Federal Rules of Appellate Procedure. Rule 4(a)(5) constrains the district court's ability to extend the time to file a notice of appeal to either "30 days after the prescribed time or 10 days after the date when the order granting the motion is entered." Fed. R. App. P. 4(a)(5). To allow the district court to extend the time to file a notice of appeal for an indeterminate period, which is essentially what the district court would do if it granted a stay in this situation, would be wholly inconsistent with the language of the rules requiring an expeditious filing of a notice of appeal. Accordingly, it was not an abuse of discretion for the district court to deny Petitioner's motion to stay proceedings.

Mathis v. Dretke, 124 Fed. App'x 865, 870 (5th Cir. Mar. 11, 2005); *see also Bowles v. Russell*, __ U.S. __, 127 S. Ct. 2360, 2366-67 (2007) (finding that the deadline for filing a notice of appeals is a jurisdictional precursor and federal courts lack the equitable power to extend that time limit). The Fifth Circuit denied rehearing. The United States Supreme Court subsequently denied Petitioner's petition for certiorari review. *Mathis v. Dretke*, 545 U.S. 1131 (June 20, 2005).

D. State Review of the Merits

On April 15, 2005, Petitioner filed a third state habeas application, again raising his *Atkins* claim in the Court of Criminal Appeals. The Court of Criminal Appeals stayed Petitioner's execution and remanded the successive state application to the trial level court for proceeding on his *Atkins* claim. After holding an evidentiary hearing, the trial court issued findings of fact and conclusions of law reconsidering that the Court of Criminal Appeals deny the *Atkins* claim. On September 20, 2006, the Court of Criminal Appeals adopted the lower court's findings and denied relief.

E. Successive Federal Proceedings

On September 29, 2006, Petitioner sought leave from the Fifth Circuit to file a successive federal habeas petition. The Fifth Circuit preliminary authorized Petitioner to file his new federal habeas petition. *In re Milton Wuzael Mathis*, 483 F.3d 395 (5th Cir. 2007). On April 4, 2007, Petitioner filed this current federal habeas petition in this Court. (Docket Entry No. 1).

Respondent has filed a motion to dismiss arguing that Petitioner's successive petition is time barred. (Docket Entry No. 7). Respondent also filed a motion for summary judgment arguing that Petitioner has not shown that he is mentally retarded as understood by *Atkins*. (Docket Entry No. 11). This Court's review of the record indicated that Petitioner had not yet shown that his pleadings complied with the AEDPA's successive filing requirements. In particular, Petitioner had not shown that his *Atkins* claim was not available to him when he filed his first

federal petition in 2003. This Court ordered Petitioner to show cause why his petition was not subject to dismissal (Docket Entry No. 13). Petitioner has responded. (Docket Entry No. 16). Two issues are now before the Court in Respondent's motion: whether Petitioner has met the AEDPA's requirements for filing a successive habeas petition and whether he filed his *Atkins* claim in a timely manner.

II. The District Court's Second Gateway Review

The "AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus application." *Tyler v. Cain*, 533 U.S. 656, 661 (2001). Congress intended its limitation on successive petitions to encourage finality and to preserve comity with the state courts. *See Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("Section 2244(b) of the statute is grounded in respect for the finality of criminal judgments."); *Johnson v. Dretke*, 442 F.3d 901, 909 (5th Cir. 2006) ("One purpose of AEDPA is to enforce the preference for the state's interest in finality of judgment over a prisoner's interest in additional review."). The AEDPA generally anticipates a "one bite at the post-conviction apple" approach to federal habeas review. *United States v. Barrett*, 178 F.3d 34, 57 (1st Cir. 1997).

Section 2244(b) serves to protect against abuse of the habeas writ. Under 28 U.S.C. § 2244(b), "if the prisoner asserts a claim that was not presented in a previous petition, the claim must be dismissed unless it falls within one or two narrow expectations." *Tyler*, 533 U.S. at 661. The statute allows an inmate to file

a successive petition under the following circumstances:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

The AEDPA assigns different roles to the circuit and district courts in evaluating whether an inmate can file a successive petition. First, a petitioner files a motion in the circuit court seeing permission to file a successive habeas petition. "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the application satisfies" certain requirements. 28 U.S.C. § 2244(b)(2)(C). Once a circuit court has made the preliminary decision that it is "reasonably likely" that the proposed successive petition meets section 2244(b)'s "stringent requirements," *In re Morris*, 328

F.3d 739, 740 (5th Cir. 2003), the inmate files his successive petition in the district court. The district court then acts as a "second-gatekeeper" and "conduct[s] a 'thorough' review to determine if the [successive petition] 'conclusively' ... does not meet AEDPA's second or successive motion requirements." *Reyes Requena v. United States*, 243 F.3d 893, 898-99 (5th Cir. 2001) (quoting *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000)); *see* 28 U.S.C. § 2244(b)(4).

In its initial gateway role, the Fifth Circuit had found that Petitioner made a *prima facie* showing that he complied with 28 U.S.C. § 2244(b). *Mathis*, 483 F.3d at 399. However, this court is not bound by the circuit court's tentative decision that Petitioner meets the AEDPA's filing requirements. *Id.* ("We note that the district court is free to reach its own conclusions on whether Petitioner's motion conclusively demonstrates that it does not meet AEDPA's second or successive motion requirements.") (quotation omitted); *see also Jordan v. Secretary, Dept. of Corrections*, 485 F.3d 1351, 1358 (11th Cir. 2007) (stating that it makes "no sense for the district court to treat [that] *prima facie* decision as something more than it is or to mine [the circuit court's] order for factual ore to be assayed. The district court is to decide the § 2244(b)(1) & (2) issues fresh, or in the legal vernacular, *de novo*."); *In re Johnson*, 322 F.3d 881, 883 (5th Cir. 2003) (finding the circuit court's decision to be "tentative"); *Brown v. Lensing*, 171 F.3d 1031, 1032 (5th Cir. 1999) ("[T]he trial court must make it s own determination that the statutory prerequisites are satisfied."). This Court "must conduct a thorough review to determine

if [Petitioner's pending petition] conclusively demonstrates that it does not meet AEDPA's second or successive motion requirements." *Johnson*, 322 F.3d at 883.

The petitioner bears the burden in the district court of showing compliance with the AEDPA's successive petition limitation. *See Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004). Unless an inmate affirmatively shows that his successive petition meets section § 2244(b)(2)'s standards, "[a] district court *shall* dismiss any claim presented in a second or successive application[.]" 28 U.S.C. § 2244(b)(4) (emphasis added); *see also Tyler*, 533 U.S. at 667 (finding that a district court is "required to dismiss" a claim unless the petitioner meets his burden). Because Petitioner made no effort to meet his statutory burden, this Court ordered him to show cause why his petition should not be dismissed. (Docket Entry No. 12).

The AEDPA authorizes a successive petition when a petitioner relies on previously unavailable constitutional law, 28 U.S.C. § 2244(b)(2)(A), or previously undiscoverable facts, 28 U.S.C. § 22343(b)(2)(B). Petitioner does not assert that he could not have discovered the factual basis for his *Atkins* claim before he filed his successive federal petition. Petitioner, therefore, must show that his *Atkins* claim meets 28 U.S.C. § 2244(b)(2)(A)'s requirements by demonstrating reliance on a new, retroactive rule that was not previously available.

The *Atkins* decision is a new rule of criminal law made retroactive by the Supreme Court. *See Morris*, 328 F.3d at 740. This case turns on whether Petitioner's *Atkins* claim was "previously available" to him. 28 U.S.C. § 2244(b)(2)(A). The AEDPA does

not define "previously unavailable." Federal courts have recognized that the term "means unavailable at the time the first habeas application was filed." *In re Mathis*, 109 F.3d 1556, 1566 (11th Cir. 1997); *see also In re Salazar*, 443 F.3d 430, 431-32 (5th Cir. 2006) (focusing on whether a claim was "available to [a petitioner] when he filed his initial habeas application"); *Rodriguez v. Superintendent, Bay State Correctional Center*, 129 F.3d 270, 274 (1st Cir. 1998) ("The time frame of the applicant's previous habeas petition provides the coign of vantage from which we assess whether a rule of constitutional law was 'previously unavailable' with reference to the availability of the claim at the time the first federal habeas application was filed."); *cf. McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (recognizing "the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition"). Relevant case law simply focuses on whether a petitioner "could have advanced the new rule of constitutional law in his initial petition." *Felker v. Turpin*, 83 F.3d 1303, 1306 (11th Cir.), *cert. dismissed*, 518 U.S. 651 (1996).

Because *Atkins* was decided almost ten months before Petitioner filed his initial petition, the claim was presumptively available to him. In this instance, Petitioner has made four arguments to show that his *Atkins* claim was not available: (1) the claim was not exhausted when he filed his federal petition; (2) Texas' two-forum rule prevented him from exhausting his claim before he filed his initial habeasl petition; (3) successive habeas actions do not toll the AEDPA's limitations period; and (4) a fundamental

miscarriage of justice will result if this Court does not allow him to file a successive petition. The Court will address each of these arguments below.

A. Exhaustion of State Remedies

The exhaustion doctrine, codified at 28 U.S.C § 2254(b),(c) requires a federal habeas petitioner to present his claims to the state's highest court of criminal jurisdiction before filing a federal court. Petitioner claims that he could not have filed his otherwise available *Atkins* claim in his first petition because he had not yet exhausted it. When Petitioner filed his initial federal petition, he acknowledged that he would be asserting an *Atkins* claim in state court. (*Mathis v. Dretke*, 03-cv-1138, Docket Entry NO. 3 at 27). Later in that litigation, Petitioner conceded that the *Atkins* claim was available to him when he filed his federal petition. (*Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 19 at 19). Petitioner claimed that the exhaustion doctrine prevented him from filing an *Atkins* claim in his first petition.

While the AEDPA strongly encourages a petitioner to exhaust his claims in state court before filing a federal petition, 28 U.S.C. § 2254(b), Petitioner has not identified any federal case holding that the exhaustion doctrine makes claims "unavailable" for the purposes of section 2244(b)(2)(A). Federal case law, in fact, holds that the unexhausted nature of a claim does not justify its exclusion from an initial habeas petition. Section 2254(b) clearly "requires that federal habeas petitioners fully exhaust available state court remedies before proceeding in federal court." *Morris v. Dretke*, 413 F.3d 484, 490 (5th Cir. 2005). However, the Fifth Circuit has held that the new claims were unexhausted when the earlier fed-

eral writ was prosecuted and will not excuse their omission.'" *Crone v. Cockrell*, 324 F.3d 833, 837 (5th Cir. 2003) (quoting *McGary v. Scott*, 27 F.3d 181, 184 (5th Cir. 1994)); *see also Reed v. Quarterman*, 2007 WL 2436206, *1 (5th Cir. Aug. 20, 2007); *In re Jimenez*, 211 Fed. App'x. 297, 298 (5th Cir. 2006). The Supreme Court has advised that those who proceed in federal court with exhausted claims while saving others for later federal review "risk[] subjecting later petitions that raise new claims to rigorous procedural obstacles." *Burton v. Stewart*, __ U.S. __, 127 S. Ct. 793, 797 (2007). The Supreme Court in another context has sharply criticized "a petitioner with unexhausted claims...who elects to proceed to adjudication of his exhausted claims ... [in] his first petition." *Id.* At __, 127 S.Ct. 1t 797. Thus, a lack of exhaustion itself does not necessarily make a new claim "unavailable" for federal review. *See Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) ("[T]he sole fact that the new claims were unexhausted when the earlier federal writ was prosecuted will not excuse their omission."). The exhaustion doctrine does not make a claim unavailable because it is not *viable*.

When he filed his initial federal petition, Petitioner apparently believed that it would be better to file a timely habeas corpus action raising only exhausted claims. This case is similar to *In re Nealy*, 223 Fed. App'x 366, 368 (5th Cir. 2007), in which a petitioner's "federal habeas counsel at that time did not believe he could investigate or raise new claims that had not been raised previously in state court." In *Nealy*, the federal district court appointed counsel in February 2002. Nealy did not file a federal petition until October 2002, ten months after the *Atkins*

decision. When he requested leave to file a successive federal application in 2007, the Fifth Circuit found that his *Atkins* claim was not unavailable to him at his initial filing. The Fifth Circuit distinguished *Nealey* from those cases where the *Atkins* decision was delivered after a petitioner had filed his initial petition. *Compare In re Nealy*, 223 Fed. App'x 366 (5th Cir. 2007), *with In re Brown*, 457 F.3d 392, 396 (5th Cir. 2006) (finding that federal and state procedure made an *Atkins* claim unavailable when the petition was filed before *Atkins*), *and In re Wilson*, 442 F.3d 872 (5th Cir. 2006) (considering the availability of an *Atkins* claim in the context of equitable tolling, not 28 U.S.C. § 2244(b)(2)(A)), 123 (5th 2004) (same). Because Nealy could have filed an *Atkins* claim in his initial petition, he could not meet the AEDPA's successive petition standards.

Had Petitioner filed his *Atkins* claim in his initial petition, the rule in *Rose v. Lundy*, 455 U.S. 509 (1982), mandated that it was subject to dismissal as a "mixed petition," that is, one raising both exhausted and unexhausted claims. *Lundy*, however, "'would have little meaning if it could be avoided by withholding unexhausted claims'" when they are otherwise available for filing in an initial petition. *Crone v. Cockrell*, 324 F.3d 833, 838 (5th Cir. 2003) (quoting *Jones*, 722 F.2d at 168). The unexhaustion of Petitioner's claim only became a problem because of Petitioner's litigation strategy. When the Supreme Court decided *Atkins*, nearly ten months remained before the AEDPA's limitations ran for Petitioner's exhausted claims. Presumably, a properly filed successive state application based on *Atkins* would have tolled the limitations period. 28 U.S.C. § 2254(d)(2).

Had Petitioner exhausted his *Atkins* claim before filing his initial petition in federal court, he could have filed a comprehensive federal petition without the procedural problems he now faces.

Petitioner's *Atkins* claim was not available – it was withheld. Allowing 28 U.S.C. § 2244(b)(2)(A)'s "previously unavailable" clause to turn on a petitioner's withholding of available claims until the last day of the limitations period and his strategy to reply on the availability of a successive federal petition violates the spirit of the AEDPA. The fact that the exhaustion doctrine forced Petitioner to make difficult choices about how to litigate constitutional claims does not make his unexhausted *Atkins* claim "unavailable" as understood by 28 U.S.C. § 2244(b)(2)(A). *See Nealy*, 223 Fed. App'x at 368. To hold otherwise would encourage inmates to withhold claims from their initial habeas action. *See United States v. Orozco-Ramirez*, 211 F.3d 862, 870-71 (5th Cir. 2000) ("The requirement that all available claims be presented in a prisoner's first habeas petition is consistent not only with the spirit of AEDPA's restrictions on second and successive habeas petitions, but also with the preexisting abuse of the writ principle. The requirements serves the singularly salutary purpose of forcing federal habeas petitioners to think through all potential post-conviction claims and to consolidate them for a unitary presentation to the district court.") The AEDPA forgives successive filing only when a claim is truly unavailable.

B. Texas' Two-Forum Rule

Petitioner argues that his *Atkins* claim was functionally "unavailable because, not only was it unexhausted, but he could not have exhausted it had

he tried. Petitioner argues that he could not file a successive state application during the ten months in which he had an unlitigated *Atkins* claim because of Texas' two-forum rule. As noted previously, the rule prevented Texas courts from considering a habeas application when a prisoner's federal petition was under federal judicial review. In other cases, the Fifth Circuit found that a claim was not available when a petitioner had an active federal petition on the date the Supreme Court decided *Atkins*. *See In re Brown*, 457 F.3d 392, 396 (5th Cir. 2006); *In re Wilson*, 442 F.3d at 872, 876 (5th Cir. 2006); *In re Hearn*, 457 F.3d 122 (5th Cir. 2004). The case differs from that scenario because for ten months after *Atkins*, Petitioner had no federal petition. Petitioner now argues that Texas' two-forum rule would have barred state habeas relief because this Court had already appointed him an attorney.

Petitioner has not pointed to any state case holding that the appointment of federal counsel triggers the two-forum rule. Petitioner, however, cites three cases for the proposition that the two-forum rule applies when a federal court "retains jurisdiction" over a habeas proceeding. *See Ex parte Green*, 548 S.W.2d 914 (Tex. Crim. App. 1977); *Ex parte McNeil*, 588 S.W.2d 592 (Tex. Crim. App. 1979); *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972). Petitioner has not shown that Texas applied its two-forum rule as broadly as he suggested. While those cases used loose language and appeared to decline state habeas review while the federal court "retained jurisdiction," all three cases only applied the two-forum rule after the inmate filed a federal habeas petition. *See Green*, 548 S.W.2d at 915-16 (inmate filed

state petition while appealing the denial of his federal habeas petition), *McNeil*, 588 S.W.2d at 593 (inmate sought state relief while federal petition was pending), *Powers*, 487 S.W.2d at 101 (inmate filed state action when federal district and circuit courts stayed actions before them). In explaining its two-forum doctrine, the Court of Criminal Appeals has explicitly stated it applied "when the applicant also has a *writ pending* in the federal courts that relates to the same conviction or same 'matter.'" *Soffar*, 143 S.W.3d at 805 (emphasis added). In practice Texas only applied the two-forum rule when a petitioner had parallel *petitions* filed in both state and federal court. The Fifth Circuit has recognized that the two-forum rule disallowed consideration of "a habeas *petition* raising the same claims or seeking the same relief as a pending federal *application*." *Graham v. Johnson*, 168 F.3d 762, 779 (5th Cir. 1999) (emphasis added); *see also Rodriguez v. Holmes*, 963 F.2d 799, 804 (5th Cir. 1992) (noting that the two-forum rule "forbids the state to consider a habeas *motion* while a similar *motion* is 'pending' in a federal court") (emphasis added); *Rumbaugh v. McKaskle*, 730 F.2d 291, 293 (5th Cir. 1984) ("[T]he Texas courts will decline to address a petition for writ of habeas corpus when the petitioner has a *writ application* pending in federal court." (emphasis added). Petitioner has not shown that Texas applied its two-forum rule when a federal court appointed counsel, but no federal petition was pending.

Petitioner also cites *McFarland v. Scott*, 512 U.S. 849 (1994), where the Supreme Court held that "a federal court entertains jurisdiction over the case not when the habeas petition is filed but when the

motion for appointment of counsel is filed," (Docket Entry No. 16 at 3), as triggering the two-forum rule. No Texas case has interpreted *McFarland* in that matter. Even federal cases have been hesitant to read *McFarland* broadly outside the statutory guarantee to the appointment of federal counsel. *See Woodford v. Garceau,* 538 U.S. 202, 209 (2003); *Cantu-Tzin v. Johnson,* 162 F.3d 295, 298 (5th Cir. 1998); *Nobles v. Johnson,* 127 F.3d 409, 414 (5th Cir. 1997); *Williams v. Cain,* 125 F.3d 269 (5th Cir. 1997).

Petitioner has not shown any Texas case applying the two-forum rule before the filing of a federal habeas petition. This Court does not sit in habeas to redefined Texas' interpretation of its own law. Petitioner has now shown why he could not litigate his *Atkins* claim in state court well before he did.

C. Statutory Tolling for Successive State Capital Habeas Application

Petitioner argues that he did not file a successive state habeas application before coming to federal court because he was afraid that the AEDPA would then have barred all federal review. Petitioner maintains that uncertainty exists about whether federal law provides for the tolling of the AEDPA's limitations period during the pendency of a successive state capital habeas application. Under 28 U.S.C. § 2244(d)(2) "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations[.]" Petitioner nevertheless contends that he "could have well forfeited federal review of his previously exhausted claims that he at-

tempted to file a successive petition raising an *Atkins* claim prior to fully litigating his first federal habeas." (Docket Entry No. 16 at 5).

Petitioner claims that the law has not settled the question of whether a successive state habeas application, and particularly one dismissed as an abuse of the writ under TEX. CODE CRIM. PRO. 11.071 § 5, will toll the limitations period for all a petitioner's potential claims. In the show-cause order, the Court cited *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999), for the proposition successive state habeas applications toll the AEDPA limitations period. Petitioner argues that the *Villegas* case only applies to Texas' non-capital habeas statute and, thus, "it cannot be said without a doubt that, if a subsequent petition is dismissed pursuant to [art. 11.071 § 5], it was indeed properly filed." (Docket Entry No. 16 at 8). Petitioner contends that counsel feared losing the ability to file any federal claims if he litigated his *Atkins* claim in state court before filing a federal petition.

There is no serious debate about whether successive capital habeas proceedings toll the AEDPA's limitations period. At least one judge on the Fifth Circuit has cited *Villegas* to allow statutory tolling for successive applications filed under Texas' capital habeas statute. *See Ruiz v. Quarterman*, 504 F.3d 523, 534 (5th Cir. 2007) (Benavides, J., dissenting). Federal district courts have likewise relied on *Villegas* to find that successive applications under art. 11.071 toll the limitations period. *See Haynes v. Quarterman*, 2007 WL 268374 (S.D. Tex. Jan. 25, 2007); *Graves v. Johnson*, 111 F. Supp.2d 857 (S.D. Tex. 2000). Without citing *Villegas*, the Fifth Circuit

has elsewhere tolled the AEDPA's limitations period during the pendency of successive capital state habeas applications. *See Rivera*, 505 F.3d at 353; *In re Lewis*, 484 F.3d 793, 796 (5th Cir. 2007); *In re Wilson*, 442 F.3d 872, 874 (5th Cir. 2006). A close review of case law reveals the Fifth Circuit assumes that the filing of a successive state habeas application tolls the limitations period for those issues raised in a capital inmate's state habeas action. *See, e.g., Nenno v. Quarterman*, 489 F.3d 214, 216 (5th Cir. 2007); *Matchett v. Drake*, 380 F.3d 844, 846-47 (5th Cir. 2004); *Morris v. Dretke*, 90 Fed. App'x 62 (5th Cir. 2004). Petitioner has not pointed to a single case where a properly filed successive state action was held insufficient to toll the limitations period for a petitioner's claims, already exhausted or otherwise.

At other points in this litigation, Petitioner has not assumed that successive habeas applications under art. 11.071 toll the AEDPA limitations period for his *Atkins* claim. (Docket Entry No. 8 at 3). Petitioner's filing of his successive state application on the last available day suggests that he intended that pleading to toll the AEDPA limitations period. Petitioner's argument that uncertainty exists about whether a successive application would qualify for statutory tolling does not show that a federal *Atkins* claim was not available to him. No merit exists to Petitioner's argument that the Fifth Circuit has not tolled petitions after successive state habeas proceedings.

D. Fundamental Miscarriage of Justice

Finally, Petitioner argues that his retardation renders him actually innocent of the death penalty, placing him outside the successive petition and limi-

tation period constraints. While 28 U.S.C. § 2254(b)(2)(B)(ii) creates an exception to the successive petition requirements that would prevent a fundamental miscarriage of justice in the manner propounded by Petitioner's show-case response, that section still requires him to prove that the *facts* of his *Atkins* claim were previously unavailable. Congress had not created an actual-innocence exception for previously available claims. Petitioner can only succeed on his fundamental-miscarriage-of-justice argument if some equitable mechanism allows him to circumvent into its decision of whether a petitioner may file a successive petition. *See In re Davis*, 121 F.3d 952, 956 (5th Cir. 1997). Petitioner has not shown that his, or by extension every, *Atkins* claim is exempt from the AEDPA's filing requirements.

E. Conclusion of De Novo Successive Petition Review

Petition has not shown that his *Atkins* claim was unavailable before he filed his successive federal habeas petition. From all appearances, Petitioner assumed that he could proceed with a litigation strategy that presupposed the filing of a successive petition. The AEDPA strongly encourages the filing of one comprehensive federal petition. While making allowances for new legal or factual development, the AEDPA does not permit a petitioner to adopt a litigation strategy that requires him to file a successive federal petition. To allow Petitioner to proceed in such a piecemeal fashion would violate the AEDPA's intention of "encourage[ing] litigants *first* to exhaust all state remedies *then* to file their federal habeas petitions as soon as possible." *Duncan v. Walker*, 533 U.S. 167, 181 (2001); *see also Burton*, ___ U.S. at ___,

127 S. Ct. at 797. Because Petitioner has not shown that he can pass through 28 U.S.C. § 2254(b)(4)'s second gateway review, this Court has no jurisdiction to consider Petitioner's successive petition.

III. Equitable Tolling

Even if his Court had jurisdiction to consider Petitioner's successive petition, he still must comply with the AEDPA's timeliness requirements. Before the AEDPA's enactment, "a prisoner faced no strict time constraints" in seeking federal habeas corpus relief. *Villegas*, 184 F.3d at 468; *see also Davis v. Johnson*, 158 F.3d 806, 809 n.4 (5th Cir. 1998). The "AEDPA establishes, for the first time, an explicit limitation period for state prisoners filing federal habeas petitions." *Fisher v. Johnson*, 174 F.3d 710, 711 (5th Cir. 1999) (citing *Lonchar v. Thomas*, 517 U.S. 314, 327 (1996)). The AEDPA, codified at 28 U.S.C. § 2244(d), "enacted a one-year period of limitation for federal habeas proceedings that runs, unless tolled, from the date on which the petitioner's conviction became final at the conclusion of direct review or during the pendency of a 'properly filed application for State post-conviction or other collateral review.'" *Cantu-Tzin v. Johnson*, 162 F.3d 295, 298 (5th Cir. 1998). Alternatively, the limitations period runs one year from a new Supreme Court decision. 28 U.S.C. § 2244(d)(1)(C).

Respondent has moved to dismiss Petitioner successive petition, contending that the one-year limitations period bars this action. The Supreme Court decided *Atkins* on June 20, 2002. Petitioner did not file his successive petition until 2007. Petitioner filed a successive state habeas application that was pending from June 20, 2003, until April 24, 2004.

The one day remaining on his limitations period, however, expired long before he filed his third state habeas application on April 15, 2005. Petitioner concedes that he did not file his petition within the statutory time limits. The Court finds that Petitioner did not file his successive federal petition in a timely manner. The AEDPA's limitations period bars Petitioner's petition unless he can show entitlement to equitable tolling.

Federal courts "must be cautious not to apply the statute of limitations too harshly[.]" *United States v. Patterson*, 211 F.3d 927, 931 (5th Cir. 2000); *see also Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999). As a judicial accommodation in the interest of justice, federal courts have applied "[t]he doctrine of equitable tolling [to] preserve[] a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998). "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999). To warrant equitable tolling, a petitioner must present more than a "garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Coleman*, 184 F.3d at 402. "Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, __ U.S. __, 127 S. Ct. 1091, 1100 (2007).

"[T]he habeas petitioner bears the burden of establishing that equitable tolling is warranted." *Howland v. Quarterman*, 507 F.3d 840, 845 (5th Cir. 2007); *see also Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000). Petitioner does not request an evidentiary hearing on the issue of equitable tolling nor does he suggest that live testimony or affidavits would be useful to development of his claim. Petitioner instead relies on two main arguments to support equitable tolling. First, Petitioner complains that Texas did not appoint him an attorney immediately after *Atkins*, thus hampering his ability to pursue an *Atkins* claim in state court. Petitioner, however, does not explain why he was able to file a successive state habeas application only two-and-a-half months after filing his initial federal petition. His federal attorney filed the successive state application. Petitioner has not explained why he could not have filed that action before invoking federal jurisdiction. The pleadings in Petitioner's initial federal action instead show an intentional litigation strategy based on the exhaustion doctrine.

Second, Petitioner claims that Texas' "two-forum rule" prevented him from filing a timely *Atkins* claim. Although Texas altered its two-forum rule soon after this Court entered judgment so that it could exert state jurisdiction when the federal courts have stayed a concurrent habeas action, the Court of Criminal Appeals dismissed Petitioner's initial state habeas proceeding because of his active federal petition. Petitioner argues that the operation of the two-forum rule excuses his tardy filing.

The question of whether Texas' two-forum rule prevented the filing of a timely federal petition arises

in two distinguishable contexts. First, the Fifth Circuit has found that the two-forum rule forgave an untimely federal petition when the Supreme Court decided *Atkins after* the filing of a federal habeas petition. *See Brown*, 457 F.3d at 396; *Wilson*, 442 F.3d at 876; *In re Hearn*, 389 F.3d 122 (5th Cir. 2004). In that context, the petitioner could not have exhausted an *Atkins* claim in state court before filing his initial petition, he could not have raised an *Atkins* claim before or during the pendency of federal review, and he would have faced significant procedural hurdles to raising the claims subsequently in state or federal court. Second, equitable tolling poses a separate concern when the *Atkins* decision was available to a petitioner before he filed his initial federal habeas action. In that context, the Court must focus on why the petitioner failed to include a claim in his initial petition, what efforts he made to exhaust his state remedies, and whether he displayed diligence in pursuing his *Atkins* claim.

Petitioner's case more closely resembles those cases where equitable tolling is not available because the two-forum rule problem flowed from the inmate's own litigation strategy and his lack of diligence. *See In re Lewis*, 484 F.3d 793, 798 (5th Cir. 2007). When Petitioner filed his federal habeas petition, an *Atkins* claim had been legally available for almost ten months. Petitioner has not argued that the factual basis of the claim was previously not available to him. Had Petitioner actually feared that the Texas courts would apply the two-forum rule, he would not have filed a state application *after* he filed his federal petition.

Any impediment imposed by Texas' two-forum rule was of Petitioner's own creation. The only reason that the state courts invoked the two-forum rule was because he prematurely filed his federal action. Thus, unlike may cases in which the Fifth Circuit has allowed *Atkins* claims to proceed in successive habeas petitions, Petitioner placed himself in a situation where the state courts would not consider his habeas claims. Had Petitioner filed his state habeas action diligently and appropriately, the question of the two-forum rule never would have arisen. In that respect, Petitioner's case differs from those in which the Fifth Circuit has found that the two-forum rule requires equitable tolling.

Looking at the entire context of this litigation history since *Atkins*, Petitioner has not shown diligence. A court will only grant equitable tolling if a petitioner displays "diligence and alacrity" in his litigation. *See Melancon v. Kaylo*, 259 F.3d 401, 408 (5th Cir. 2001); *Phillips*, 216 F.3d at 511; *Felder v. Johnson*, 204 F.3d 168, 174 (5th Cir. 2000); *Coleman*, 184 F.3d at 402. "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984); *see also Coleman*, 184 F.3d at 403 ("In order for equitable tolling to apply, the applicant must diligently pursue his § 2254 relief.").

The limitations problem in this case largely stems from the fact that Petitioner waited until the last day of his one-year period to file an *Atkins* claim. He has not explained why he waited. The Fifth Circuit shows little patience for petitioners who have delayed filing their *Atkins* claim until the last min-

ute, bringing the threat of a time bar. *See Lewis*, 484 F.3d at 798; *cf. Johnson v. Quarterman*, 483 F.3d 278, 287 (5th Cir. 2007) ("His counsel was well aware of the deadline and had ample time to prepare the petition, but waited until the very last minute to complete it."); *Flores v. Quarterman*, 467 F.3d 484, 487 (5th Cir. 2007) ("His counsel was well aware of the deadline and had ample time to prepare the petition, but waited until the very last minute to complete it."); *Flores v. Quarterman*, 483 F.3d 484, 487 (5th Cir. 2006) (considering the fact that a petitioner waited until the last minute to file his state action). Petitioner has given the Court no reason to suppose that justifiable strategic choices or state impediments brought about his filing on the last available day. By filing on the last day, Petitioner placed himself in a situation where he would have to immediately act in federal court to preserve his rights, or otherwise lose the ability to seek federal review. *See Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (finding that a petitioner is not entitled to equitable tolling when he files his state application on the last day available under the limitations period).

Petitioner did not show diligence before this Court denied his initial petition. The two-forum ceased to be such an unforgiving concern for Petitioner on February 11, 2004, when the Court of Criminal Appeals decided *Soffar*. When Petitioner filed his Rule 59(e) motion on February 19, 2004, though he did not explicitly mention *Soffar*, his pleading arguably captured the essence of that holding by asking for a stay. As the Fifth Circuit found on appeal, however, nothing was left to stay at that point but the notice of appeal. Petitioner did not even

inform the Court that Texas had dismissed his successive application based on *Soffar* until after the denial of his Rule 59 motion. When he asked this Court to reconsider the denial of his Rule 59(e) motion, this Court could do nothing, but advised him to see equitable relief in the Fifth Circuit.

Petitioner's subsequent actions do not display diligence. When the Court of Criminal Appeals dismissed his successive action the federal limitations period began to run again and then quickly expired. Petitioner did not immediately seek a stay in the Fifth Circuit to comply with *Soffar*. For over a month, his motion for reconsideration was pending in the Court of Criminal Appeals. Presumably, filing an emergency motion for a stay in the Fifth Circuit would have allowed a state habeas action to proceed under the new *Soffar* procedure. *See Gomez v. Dretke*, 422 F.3d 264, 268-69 (5th Cir. 2005) (staying a federal appeal to allow a petitioner's successive state action to proceed under *Soffar*). Even after the Court of Criminal Appeals denied reconsideration, Petitioner could have asked the Fifth Circuit for a stay and filed a new state action. Petitioner instead allowed time to pass before acting on his *Atkins* claim. Petitioner did not request a stay in his motion for a Certificate of Appealability ("COA"), but weakly stated that "some federal court must stay the proceedings[.]" *Petitioner's Application for Certificate of Appealability*, 04-70015, at 10 (5th Cir. Aug. 12, 2004). Since the Fifth Circuit did not stay his case, this court obviously did not consider his comments to amount to a request to stay his federal proceedings.

The Fifth Circuit declined to issue a COA on March 11, 2005. By then, Petitioner was facing an

execution date of April 20, 2005. Given the unlikely chance that the Supreme Court would exert certiorari review over his federal habeas action, Petitioner faced a viable and serious execution date. Petitioner waited until March 25, 2005, to seek rehearing in the Fifth Circuit. Only on April 6, 2005, did Petitioner ask the Fifth Circuit to stay his execution so that a successive state habeas application could proceed. Petitioner then did not file his final state habeas application until April 15, 2005. Even at the last minute, Petitioner did not diligently pursue his *Atkins* claim.

Petitioner's efforts to litigate his *Atkins* claim were did not reflect the diligence anticipated by equitable tolling jurisprudence. He has not explained significant gaps in litigating that claim in state and federal court. Petitioner has simply not shown the diligence necessary to warrant equitable tolling.

The procedural morass in this case did not come from Texas' two-forum rule, but from Petitioner's choice not to seek a successive state habeas application before filing his federal petition, his tardy filing of his third application, and his failure to seek a federal stay. While it is undeniably a harsh result, this Court is bound by the clear mandate of the AEDPA. Because Petitioner did not file his successive petition in an timely manner his arguments are without merit.

IV. The Merits

This Court has found that procedural law clearly forecloses federal review. Respondent has filed a motion for summary judgment. (Docket Entry No. 11). Petitioner did not file a reply, possibly be-

cause Respondent's motion to dismiss was pending. Petitioner has had an adequate opportunity to respond and brief the merits of his *Atkins* claim. In an abundance of caution, this Court reviews Petitioner's *Atkins* claim.

The state habeas court held that an evidentiary hearing and considered substantial evidence. Under the precedent established in *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004), the Court of Criminal Appeals adjudicates *Atkins* claims under the framework established by the American Association on Mental Retardation ("AAMR"). In essence, a valid *Atkins* claim in Texas contains three indispensable components: (1) substantial limitations in intellectual functioning; (2) significant limitations in adaptive skill areas; and (3) manifestation of those limitations before age 18. Petitioner must meet all three elements to show that his execution would violate the Constitution.

Petitioner bases his *Atkins* claims on testing showing that his IQ fell below 70 (the traditional cutoff for retardation absent measurement error), expert and lay testimony that he lacked normal life skills, and the opinion that the onset of his retardation came before age 18. The state district court considered his evidence and testimony and found that, while he exhibited a learning disability and mental impairment due to his heavy drug use, he was not retarded. In its decision, the state district court comprehensively reviewed the evidence, made detailed and precise fact findings, and found Petitioner's claim lacking. This Court's review of that decision is deferential, respecting all factfindings as correct unless proven otherwise and assessing the reasonable-

ness of the state court's ultimate determination. *See* 28 U.S.C. § 2254(d) & (e). Under that review, the court finds that the state court's decision that Petitioner did not fall into the category of offenders *Atkins* intended to protect was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Even if this Court could reach the merits of Petitioner's claim, habeas relief is unavailable to him.

V. Certificate of Appealability

Because of the serious nature of his claims, the fact that he faces a sentence of death, and the procedural issues his raises, this Court certifies an appeal on all relevant issues under 28 U.S.C. § 2253.

VI. Conclusion

Petitioner's has not shown that federal law permits him to file a successive habeas petition. In the alternative, Petitioner has not complied with the AEDPA's one-year limitations period in filing his claim and no basis for equitable tolling exists. Finally, if the Court could consider the merits of Petitioner's claims, he has not shown that he is exempt from execution under *Atkins*. The Court, however, will issue a Certificate of Appealability on all issues addressed in this Order. Petitioner's petition is **DISMISSED WITH PREJUDICE.**

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 31st day of March, 2008, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MILTON WUZAEL MATHIS,	§	
Petitioner,	§	
	§	
v.	§	CIVIL NO. H-07-CV-1142
	§	
NATHANIEL QUARTERMAN, Director, Correctional Institutions Division, Texas Department of Criminal Justice,	§	
Respondent.	§	

ORDER TO SHOW CAUSE

Milton Wuzael Mathis has already once sought federal relief. This Court denied his initial federal habeas petition, *Mathis v. Dretke*, H-03-cv-1138, Docket Entry No. 17, the Fifth Circuit affirmed, *Mathis v. Dretke*, 124 Fed. App'x 865 (5th Cir. 2005), and the Supreme Court denied his petition for certiorari review, *Mathis v. Dretke*, 545 U.S. 1131 (2005). On April 2, 2007, the Fifth Circuit authorized Mathis to file a successive federal habeas corpus petition. *In re Mathis*, 483 F.3d 395 (5th Cir. 2007). Mathis has now filed his successive petition alleging that he suffers from mental retardation that, under *Atkins v. Virginia*, 536 U.S. 304 (2002),

prevents his execution. (Docket Entry No. 1). Notwithstanding the Fifth Circuit's authorization, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") requires this Court to perform a second review of whether Mathis' successive petition satisfies 28 U.S.C. § 2244(b)'s filing requirements. Mathis has not made any attempt in this Court to show compliance with the AEDPA. For the reasons discussed below, this Court questions whether jurisdiction exists to consider Mathis' successive petition. Accordingly, the Court orders Mathis to show cause why his case should not be dismissed under 28 U.S.C. § 2244(b)(4).

Federal law erects high barriers to habeas relief, particularly in the case of petitioners, such as Mathis, who have already once availed themselves of federal habeas review. The AEDPA made it "significantly harder for prisoners filing second or successive federal habeas applications under 28 U.S.C. § 2254 to obtain hearings on the merits of their claims." *Graham v. Johnson*, 168 F.3d 762, 772 (5th Cir. 1999). Under 28 U.S.C. § 2244(b)(2)(C), "[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a *prima facie* showing that the application satisfies" certain requirements. The statute allows an inmate to file a successive petition under the following circumstances:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (B)(1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). A circuit court preliminarily authorizes the filing of a successive action if a petitioner shows that it is "reasonably likely" that his successive petition meets section 2244(b)'s "stringent requirements." *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003). After the circuit's authorization of a successive petition, this Court acts as a "second-gatekeeper" and "conduct[s] a 'thorough' review to determine if the motion 'conclusively' demonstrates that it does not meet AEDPA's second or successive motion requirements." *Reyes-Requena v. United States*, 243 F.3d 893, 898-99 (5th Cir. 2001) (quoting *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000)); *see* 28 U.S.C. § 2244(b)(4).

Respondent has filed a motion to dismiss on the basis of the AEDPA's limitations period. (Docket Entry No. 7). While Respondent's motion to dismiss does not focus on the application of section 2244(b) to Mathis' *Atkins* claim, the AEDPA states that "[a] district court *shall dismiss* any claim presented in a second or successive application that the court of appeals has authorized to be filed *unless the applicant*

shows that the claim satisfies the requirements of this section." 28 U.S.C. § 2244(b)(4) (emphasis added). The petitioner bears the burden in the district court of showing statutory compliance. *See Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004) ("The applicant bears the burden of demonstrating that the petition does in fact comply with that statute, and the district court shall dismiss the petition unless that showing is made."). This Court is "required to dismiss" the claim unless the petitioner meets his burden. *Tyler v. Cain*, 533 U.S. 656, 667 (2001).

In its initial gateway role, the Fifth Circuit has found that Mathis made a *prima facie* showing that he complied with 28 U.S.C. § 2244(b)'s requirements. While the circuit court has allowed Mathis to pass through the first gateway, it makes "no sense for the district court to treat [that] *prima facie* decision as something more than it is or to mine [the circuit court's] order for factual ore to be assayed. The district court is to decide the § 2244(b)(1) & (2) issues fresh, or in the legal vernacular, *de novo*." *Jordan v. Secretary, Dept. of Corrections*, 485 F.3d 1351, 1358 (11th Cir. 2007); *see also In re Johnson*, 322 F.3d 881, 883 (5th Cir. 2003) (finding the circuit court's decision to be "tentative in the following sense: the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the finding of such motion"). This Court, therefore, "must conduct a thorough review to determine if the motion conclusively demonstrates that it does not meet AEDPA's second or successive motion requirements." *In re Johnston*, 322 F.3d at 883.

This Court questions whether Mathis has met his burden to show compliance with the AEDPA's successive filing requirements. Section 2244(b)(2) authorizes a successive habeas petition in only two circumstances: (1) when the petitioner relies on a "new rule of constitutional law" that was "previously unavailable" and (2) when the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and the facts prove by "clear and convincing evidence" that "but for the constitutional error, no reasonable factfinder would have found the applicant guilty[.]" Since the legal and factual predicate for his *Atkins* claim appears to have been fully available to Mathis before he filed his initial federal petition, it appears that Mathis has not shown compliance with 28 U.S.C. § 2244(b)'s strict requirements.

This Court appointed federal counsel on April 29, 2002. *Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 2. On June 20, 2002, the Supreme Court issued the *Atkins* decision. Thus, unlike many cases in which the Fifth Circuit has allowed *Atkins* claims to proceed in successive habeas petitions, the *Atkins* decision was available to Mathis well before his filed his initial federal petition on April 3, 2003. In fact, when Mathis filed his initial federal petition, he advised the Court that he was "planning to file a second state habeas application based on *Atkins*" and he raised a claim that trial counsel should have considered his I.Q. as a source of mitigating evidence. *Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 3 at 27. However, Mathis made no attempt to raise an *Atkins* claim, despite its legal availability, in his first petition.

Two-and-a-half months after filing in federal court, Mathis filed a successive state habeas application based on *Atkins*. Mathis waited until after this Court denied his initial habeas application to ask this Court to abate his appeal so that he could exhaust state remedies. In his Rule 59(e) motion, Mathis conceded that "the *Atkins* decision and a factual foundation for a claim were available when the Section 2254 petition was filed[.]" *Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 19 at 19. He reportedly did not file the *Atkins* claim in his initial petition because "of the important problem of lack of exhaustion." *Mathis v. Dretke*, 03-cv-1138, Docket Entry No. 19 at 19.

The exhaustion doctrine did not make Mathis' claim unavailable to him. Federal courts require the complete exhaustion of state court remedies. 28 U.S.C. § 2254(b)(1)(A). Federal law plainly required Mathis to file a successive state application before he sought federal review of his *Atkins* claim. The *timing* of that exhaustion, however, caused the procedural difficulties in this case. Mathis filed his federal habeas petition exactly one year after the state courts first denied habeas relief – he was obviously concerned about the AEDPA's limitations period. Mathis, however, did not need to file his federal petition before seeking successive state habeas relief. The Fifth Circuit has long held that successive state habeas applications, even those which the Texas courts refuse to consider on the merits, toll the AEDPA's limitations period. *See Villegas v. Johnson*, 184 F.3d 467, 473 (5th Cir. 1999). Mathis should have filed his successive state habeas application first. While he had no state appointed counsel, his

federal appointed attorney filed the successive state action. He has not explained why that case could not have been filed two-and-a-half months earlier or how an *Atkins* claim only became available then. Instead, Mathis apparently withheld a claim from his federal petition and adopted a habeas litigation strategy that presupposed the filing of a successive federal petition. To allow him to proceed in such a piecemeal fashion would violate the AEDPA's intention of "encourage[ing] litigants *first* to exhaust all state remedies *then* to file their federal habeas petitions as soon as possible." *Duncan v. Walker*, 533 U.S. 167, 181 (2001).

Mathis' procedural problems seem to be of his own making. Because Mathis chose to litigate his *Atkins* claim as he did, the state courts dismissed his first successive state action under its two-forum rule, the federal courts denied his motions to stay the federal action, he had to proceed under the AEDPA's stringent successive petition requirements, and the question of compliance with the AEDPA's limitations period now looms. Mathis himself chose to proceed to federal court before fully exhausting all his available claims. The only reason that a federal *Atkins* claim was unavailable to Mathis in his federal petition was because he chose to litigate in federal court out of turn. Mathis simply does not explain why he could not have filed his successive state action first.

When the Fifth Circuit engaged in its preliminary review, that court looked at the successiveness question in a *prima facie*, threshold context. There, Respondent stated that Mathis met the initial procedural requirements for filing a successive habeas petition. *Mathis v. Quarterman*, No. 06-20806,

Response/Opposition by State of Texas at 10. The Fifth Circuit recognized that concession. *See In re Mathis*, 483 F.3d at 397. Respondent has not renewed that concession under the second gateway review. This Court's review, however, encompasses greater ground than the Fifth Circuit's threshold inquiry. Particularly, this Court considers at a more-extensive depth Mathis' litigation history and his prior concession that his *Atkins* claim was unavailable to him well before he filed his initial federal petition. Because is appears that Mathis had an available *Atkins* claim, knew he had that claim, and previously conceded that the claim was available, Mathis has not yet met his burden of showing that he satisfies 28 U.S.C. § 2244(b).

Accordingly, the Court **ORDERS** Mathis to **SHOW CAUSE** within thirty (30) days from the entry of this Order why this case should not be dismissed. Respondent may file any applicable briefing within thirty (30) days thereafter.

Signed at Houston, Texas, on September 19, 2007.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of
Appeals Fifth Circuit
FILED
April 2, 2007
Charles R.
Fulbruge III
Clerk

No. 06-20806

In re MILTON WUZAEL MATHIS

Movant.

Order on Motion for Leave to File Successive Writ
in the United States District Court
for the Southern District of Texas

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Milton Mathis seeks permission to file a successive habeas claim in federal district court based upon *Atkins v. Virginia*, 536 U.S. 304 (2002). For the

following reasons, we grant him permission to file a successive federal habeas application.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 15, 1998, Chris Lentsch heard gunshots in his home and turned to see Mathis exiting Travis Brown's room with a gun in his hand. Mathis claimed that Brown had just shot himself. Lentsch told Mathis to put the gun down, but Mathis shot fifteen-year-old Melanie Almaguer in the head, leaving her alive but paralyzed from the neck down. Mathis then shot Daniel Hibbard in the head, causing his death. Mathis finally pointed the gun at Esmerelda Lester, whereupon he discovered he was out of bullets. Mathis thereafter rummaged through the house, set fire to Brown's room, threatened Lester and Lentsch, and finally left in Brown's car. Mathis was later apprehended and indicted.

Mathis was convicted and sentenced to death. The Court of Criminal Appeals affirmed his conviction and sentence on direct appeal on February 13, 2002. Mathis's first state petition for writ of habeas was denied on April 3, 2002. Mathis filed his first federal habeas petition on April 3, 2003, and it was denied on February 2, 2004. While his federal habeas petition was pending, Mathis filed a successive state habeas claim on June 20, 2003, raising his *Atkins* claim for the first time. On March 3, 2004, the Court of Criminal Appeals dismissed Mathis's *Atkins* application because he had not shown that the federal court stayed its proceedings as required by *Ex Parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004).

On February 17, 2004, Mathis filed a motion for reconsideration with the federal district court and

at the same time requested that the district court hold the case in abeyance pending the United States Supreme Court's decision in *Atkins v. Virginia*. The district court denied the motion on March 11, 2004, and Mathis appealed on April 8, 2004, seeking a COA, which the lower court denied.

Mathis then applied for a COA from this court on August 10, 2004, seeking a stay of the federal proceedings so he could return to state court and raise his *Atkins* claim. This court denied both Mathis's application for a COA and his motion for a stay of execution on March 11, 2005. Mathis then filed a successive habeas application in state court on April 15, 2005, also seeking a stay of execution. The Court of Criminal Appeals granted the stay, and the case was remanded to the trial court for consideration of Mathis's *Atkins* claim.

The state trial court held an evidentiary hearing in September of 2005, and on January 5, 2006, recommended that Mathis be denied habeas relief. The Court of Criminal Appeals adopted the trial court's findings and conclusions and denied relief on September 20, 2006. Mathis now seeks to file a successive federal habeas petition raising his *Atkins* claim.

II. DISCUSSION

"The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the applicant satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C). Because Mathis is asserting an *Atkins* claim, we must consider three elements of his prima facie case:

"1) [whether] the claim[] to be presented in the proposed successive habeas corpus application [has] not previously been presented in any prior application to this Court; 2) [whether] the claim to be presented in the proposed successive habeas application relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable ... 3) and [whether] the applicant should be categorized as 'mentally retarded' as defined in [*Atkins* and *Penry v. Lynaugh*, 492 U.S. 302 (1989)]." *In re Morris*, 328 F.3d 739, 740-41 (5th Cir. 2003 ((internal citations omitted). The Director concedes that Mathis's claim satisfies the first two elements; the only issue to be determined by this court is whether or not Mathis has presented a prima facie case that he is mentally retarded.

A prima facie showing of mental retardation is made out in this context if Mathis makes "a sufficient showing of possible merit to warrant a fuller exploration by the district court. . . . If . . . it appears reasonably likely that the application satisfies the stringent requirement for the filing of a second or successive petition, we shall grant the application." *Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997); *See Reyes-Requena v. United States*, 243 F.3d 893, 898-99 (5th Cir. 2001) (quoting *Bennett*). "[T]he state court findings concerning the *Atkins* claim are wholly irrelevant to our inquiry as to whether [Mathis] has made a prima facie showing of entitlement to *proceed* with his federal habeas application, which is an inquiry distinct from the burden that [Mathis] must bear in proving his claim in the district court." *In re Wilson*, 442 F.3d 872, 878 (5th

Cir. 2006) (emphasis in original). If we grant the motion, the district court must conduct its own independent review of whether or not Mathis has met the requirements of § 2244(b). *Morris*, 328 F.3d at 741 (quoting *Reyes-Requena*, 243 F.3d at 899). The district court is, therefore, the "second gate through which the petitioner must pass before the merits of his or her motion are heard." *Id.* (internal citations and quotations omitted).

Whether or not Mathis has made a prima facie showing of mental retardation must be judged by the American Association on Mental Retardation's ("AAMR") definition and associated factors. *See* AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992); *see also Ex Parte Briseno*, 135 S.W.3d 1 (Tex. 2004) (noting additional factors for consideration). "Mental retardation is a disability characterized by three criteria: significant limitation in intellectual functioning, significant limitation in adaptive behavior and functioning, and onset of these limitations before the age of 18." *In re Hearn*, 418 F.3d 444, 445 (5th Cir. 2005) (citing the AAMR factors).

First, Mathis alleges that Dr. Gilda Kessner administered the Weschler Adult Intelligence Scale ("WAIS") test to him in 2005, and his score was 64, which placed him in the range of "mild mental retardation." Mathis also presented two other IQ tests, a Weschler Intelligence Scale for Children-Revised ("WISC-R") test given in 1991 on which he scored a 79 and another WAIS given in 2000, prior to the *Atkins* decision, on which he scored a 62. Typically, a

person's IQ must be measured at 70 or below to qualify as mentally retarded. *Hearn*, 418 F.3d at 447 n.4.

Second, Mathis presented the affidavits of several lay witnesses who opined on Mathis's abilities in the so-called "adaptive skill areas." Mathis alleges that he was placed in "special education" classes in eighth grade and failed the ninth grade. Additionally, Mathis notes his life-long difficulties counting money and following simple commands. Lay witnesses testified to his poor hygiene and odd sartorial habits. Finally, Mathis was noted to have difficulty forming social relationships because of his reluctance to communicate and his gullibility. Lay witnesses also noted their belief that Mathis was retarded. Based on all of the above, Mathis states that Dr. Kessner diagnosed him with mental retardation, applying the AAMR criteria.

Mathis does not present any specific evidence beyond the foregoing that his retardation manifested itself prior to the age of eighteen, as required by the AAMR. However, the lay testimony detailed Mathis's many problems during his childhood, similar to *In re Henderson*, 462 F.3d 413, 416 (5th Cir. 2006) & *Morris*, 328 F.3d at 741 (Higginbotham, J., concurring). Dr. Kessner's diagnosis of mental retardation under the AAMR indicates that she determined that Mathis's onset was prior to his eighteenth birthday.

The Director rebuts much of Mathis's evidence with counter-evidence. First, the Director notes that the IQ test given to Mathis in 1991, when he was below eighteen years of age, did not place him in the

range of mental retardation.[1] The Director also notes that at the time of his incarceration in 2000, Dr. Michael Gilhousen conducted an IQ test and an evaluation of Mathis and did not diagnose mental retardation because of his belief that Mathis's limitations stemmed from heavy drug use and did not manifest themselves prior to Mathis's eighteenth birthday. The Director argues that Mathis's later IQ test does not establish mental retardation without some showing of pre-eighteen onset.

The Director argues that while Mathis's academic record is "less than stellar," many of his problems were caused by poor attendance and discipline problems rather than mental retardation. The Director also points out that much of Mathis's lay testimonial evidence is contradictory and self-serving at best. The Director contends that the vast differences in some of the witnesses' testimony at trial and at the *Atkins* hearing below render their opinions suspect. The Director also relies on Mathis's testimony at his trial, noting that it is coherent, indicates complex thought processes, and demonstrates self-interest. Additionally, the Director points out that

[1] The Director also responds to an argument that Mathis apparently made in his state *Atkins* claim but does not specifically raise before this court that his score on the WISC-R must be adjusted for the Flynn Effect. The Flynn Effect, which has not been accepted in this Circuit as scientifically valid, *In re Salazar*, 443 F.3d 430, 433 n.1 (5th Cir. 2006), posits that, over time, the IQ scores of a population rise without corresponding increases in intelligence and thus the test must be re-normalized over time. Because Mathis relies primarily on his IQ score on the test given by Dr. Kessner in 2005, we will make our determination of his ability to make out a prima facie case based on this score, while taking into account the existence of multiple measures of Mathis's IQ.

Mathis did not present any evidence on the *Briseno* factors and argues that each of them weighs against a finding of mental retardation.

Cases in which this court has denied a motion to file a successive habeas claim based on Atkins usually involve sparse records, where no expert has diagnosed the movant with retardation. In *In re (Kia) Johnson*, 334 F.3d 403 (5th Cir. 2003), Johnson presented only three pieces of evidence: two letters from a forensic psychologist noting "areas of concern" and a seventh grade transcript that showed his many failing grades. *Id.* at 404. This evidence was not enough to make out a prima facie case of retardation. *Id.* Generally, having an expert testify that you are "at risk" of mental retardation because of congenital factors, poverty, and abuse is not enough to support a successive Atkins petition, *In re Campbell*, 82 Fed. Appx. 349, 351 (5th Cir. 2003), nor is presenting a claim that your IQ test scores are flawed without presenting any affirmative evidence of the AAMR factors, *In re Salazar*, 443 F.3d 430, 432-33 (5th Cir. 2006). However, having a psychiatrist testify as to mental retardation provides significant, if not necessarily conclusive, prima facie support for an *Atkins* claim. *See generally Hearn*, 418 F.3d 444; *see also Salazar*, 443 F.3d at 434 (noting that "no professional who has ever personally evaluated Salazar has labeled him mentally retarded").

The evidence in this case is similar to the evidence at issue in *Henderson*, 462 F.3d 413, in which this court concluded that the petitioner had made a prima facie showing of mental retardation. Henderson presented evidence that his IQ had been tested as 66, while the State presented an IQ test on

which he scored an 83. *Id.* at 415-16. Henderson presented lay testimony from several witnesses about his special education classes, poor hygiene, strange dressing habits, and poor social skills, while the State countered with testimony from prison officials about Henderson's good vocabulary and reading habits. *Id.* at 416-17. Neither party entered much evidence specifically on the point of pre-eighteen onset. *Id.* at 417. Based on the above evidence and Henderson's burden to show a prima facie case, the court granted Henderson's motion. *Id.*

In this case, both sides have expert opinions on whether or not Mathis is retarded based on the available evidence, and there are varying measures of Mathis's IQ. Additionally, while there is extensive lay testimony in this case, the Director argues that much of it is a contradictory. A prima facie showing is only "a sufficient showing of possible merit to warrant a fuller [exploration] by the district court." *Henderson*, 462 F.3d at 415 (quoting *Hearn*, 418 F.3d at 445) (alteration in original). We conclude, using *Henderson* as a guide, that Mathis has presented enough evidence to this court to warrant the district court's considering his *Atkins* claim under the framework laid out in *Reyes-Requena*. We note that the district court is free to reach its own conclusions on whether Mathis's motion "'conclusively' demonstrates that it does not meet AEDPA's second or successive motion requirements." *In re (Michael) Johnson*, 322 F.3d 881, 883 (quoting *Reyes-Requena*, 243 F.3d at 899). We express no view on whether Mathis will or ultimately should prevail on his claim of retardation.

We must also consider whether Mathis's application was timely filed within the one-year period of limitation allowed by the statute. 28 U.S.C. § 2244(d)(1). Unless Mathis is entitled to equitable tolling, his successive federal habeas claim raising the *Atkins* issue, filed initially on September 26, 2006, is well past the June 20, 2003 deadline.

When Mathis filed his application in state court raising his *Atkins* issue on June 20, 2003, the very last day of the AEDPA limitations period on *Atkins* claims, the time for filing in federal court was tolled for as long as his application was pending in the Texas courts. *See Wilson*, 442 F.3d at 874. "The Texas two-forum rule reasonably caused [Mathis] to delay filing a state habeas leaving himself only one day after the state court ruling to obtain authorization and file a federal habeas petition." *Id.* at 878. Indeed, Texas's modification of the two-forum rule was based on the "problematic situation when the Supreme Court announces a 'watershed' procedural or substantive change in the law which applies retroactively to all cases, even those on collateral review." *Soffar*, 143 S.W.3d at 806 (mentioning *Atkins* specifically). "[B]ringing his *Atkins* claim in state court would have required [Mathis] to abandon his initial federal habeas application and sacrifice permanently the claims within it in." *Wilson*, 442 F.3d at 876.

However, based on the record in this case, it is unclear if equitable tolling is warranted. After Mathis's initial federal habeas application was denied on March 11, 2005, over a month passed before Mathis filed his successive state habeas application raising his *Atkins* claim for the second time in state

court. While we recognize that Mathis's situation is similar to others in which we have allowed equitable tolling of the statutory limitation, *see Wilson; In re Hearn*, 376 F.3d 447 (5th Cir.), *on rehearing* 389 F.3d 122 (5th Cir. 2004), we decline to address the issue in this case as neither party has briefed the issue. Instead, we "leave it for the district court to decide whether [Mathis's] case presents the 'rare and exceptional circumstances' that would entitle him to the benefit of equitable tolling." *Henderson*, 462 F.3d at 417; *see also Salazar*, 443 F.3d at 434 n.2 (It is an open question in this Circuit "whether, in our role as 'gatekeeper' under § 2244(b)(3)(C), we have the statutory authority to deny a motion for authorization solely on the basis of timeliness under § 2244 (d)(1)(C).").

III. CONCLUSION

For the foregoing reasons, we grant Mathis's motion to file a successive federal habeas claim.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-70021

MILTON WUZAEL MATHIS

Petitioner – Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent – Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 8/20/10, 5 Cir., _____, _____, F.3d _____)

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service

of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT.

/s/ Carl E. Stewart

United States Circuit Judge

REHG6A

APPENDIX G

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MILTON WUZAEL MATHIS,	§	
Petitioner,	§	
	§	
v.	§	NO. H-07-CV-
	§	1142
	§	
NATHANIEL QUARTERMAN, Director, Correctional Institutions Division, Texas Department of Criminal Justice,	§	
Respondent.	§	

FINAL JUDGMENT

The Court **DISMISSES** Milton Wuzael Mathis' successive federal habeas petition **WITH PREJUDICE**.

The Clerk shall enter this Order and provide a copy to all parties.

Signed on this the 31st day of March, 2008, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-50,772-03

EX PARTE MILTON WUZAEL MATHIS

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 31,361-C IN THE 268TH DISTRICT COURT FORT BEND COUNTY

Per Curiam.

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

On September 7, 1999, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Code of Criminal Procedure article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Mathis v. State*, 67 S.W.3d 918 (Tex. Crim. App. 2002).

Applicant presented two allegations in his application. In his first claim, applicant asserted that his execution would violate the United States Su-

preme Court's opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the Eighth Amendment prohibits the execution of the mentally retarded. In his second claim, applicant asserted that his execution would violate his due process rights unless he was afforded a full and fair hearing on his claim of mental retardation with access to the tools necessary to establish his claim. By written order dated April 19, 2005, this cause was remanded to the trial court for consideration of applicant's claims.

On remand, the trial court conducted a live hearing, after which it entered findings of fact and conclusions of law recommending that relief be denied on applicant's claims. This Court has reviewed the record. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, the review sought is denied.

IT IS SO ORDERED THIS THE 20TH DAY OF SEPTEMBER, 2006.

Do Not Publish

[SEAL OF DIS-
TRICT COURT,
FORT BEND
COUNTY, TEXAS]

APPENDIX I

Trial Court Case No. 31631-A
Court of Criminal Appeals No. WR-50,772-03

EX PARTE	§	IN THE 268TH DISTRICT COURT
	§	OF
MILTON WUZAEL MATHIS Applicant	§	FORT BEND COUNTY, TEXAS

SUBSEQUENT WRIT OF HABEAS CORPUS
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The Court, having considered Applicant's subsequent application for writ of habeas corpus, the supporting documentation attached to Applicant's initial application for writ of habeas corpus, the affidavits attached to Applicant's initial application for writ of habeas corpus, the Respondent's Original Answer to the initial writ of habeas corpus, the supporting documentation attached to the Respondent's Original Answer to the initial writ of habeas corpus, the record of the pre-trial hearings regarding Applicant's case in cause no. 31,361-A, the evidence elicited at Applicant's capital murder trial in cause no. 31,361-A, official court documents and records, the testimony and evidence elicited at the hearing on Applicant's subsequent writ of habeas corpus, and the Court's personal recollection, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Proecdural History

1. Applicant, Milton Wuzael Mathis, was indicted and convicted of the felony offense of capital murder of Travis Brown and Daniel Hibbard in cause no. 31,361-A in the 268th District Court of Fort Bend County, Texas.

2. The trial court assessed Applicant's punishment at death by lethal injection after the jury affirmatively answered the first two special issues and negatively answered the third special issue on September 21, 1999.

3. Applicant timely filed an "Application for Post Conviction Writ of Habeas Corpus on February 6, 2001 sworn to and verified by Applicant's writ counsel.

4. This Court denied Applicant's first application for writ of habeas corpus and entered findings of fact and conclusions of law that were adopted by the Court of Criminal Appeals on April 3, 2002.

5. On April 3, 2002, the Court of Criminal Appeals denied habeas review based upon this Court's recommendations and its own review.

6. On April 3, 2003, Applicant filed a timely petition for writ of habeas corpus in the United States District Court for the Southern District of Texas.

7. On July 24, 2003, the Court of Criminal Appeals received a second subsequent writ of habeas corpus wherein Applicant converted his claim of incompetence into a claim of exemption from the death penalty based upon Atkins v. Virginia.

8. On February 2, 2004, the United States District Court for the Southern District of Texas denied habeas corpus relief in Applicant's federal habeas case.

9. On March 3, 2004, the Court of Criminal Appeals dismissed with leave to refile Applicant's first subsequent writ of habeas corpus alleging a claim of exemption from the death penalty based upon Atkins v. Virginia.

10. On March 11, 2005, the United States Court of Appeals for the Fifth Circuit denied Applicant's request for certificate of appealability in order to appeal the federal district court's denial of federal habeas relief.

11. On April 15, 2005, the Court of Criminal Appeals received Applicant's second subsequent writ of habeas corpus based upon Applicant's claims of mental retardation.

12. On April 19, 2005, the Court of Criminal Appeals granted a stay of execution and remanded Applicant's second subsequent writ of habeas corpus to this Court for a hearing to consider Applicant's claims.

13. On August 2, 2005, this case was set for a hearing wherein Applicant moved for a continuance.

14. This Court granted the continuance and set this case for a hearing on September 6, 2005.

15. On September 6, 2005, Applicant and his counsel appeared again and again moved for a continuance which this Court granted. This Court then reset the case for a hearing on September 12,

2005.

16. On September 12, 2005, this Court held a hearing in the above referenced case on the claim of mental retardation raised in Applicant's second subsequent writ of habeas corpus.

Evidence Elicited at Trial

17. Applicant admitted to shooting Travis Brown twice. (40 RR at 2-3).

18. The medical examiner testified that Travis Brown had two bullet wounds in the head. (36 RR at 31).

19. The bullets that caused the two wounds in Travis Brown's head traveled left to right and slightly upward to the front of Travis Brown's skull. (36 RR at 31-33).

20. Travis Brown's blood was found on Applicant's clothes. (37 RR at 100-01).

21. Three eyewitnesses were present in the house when Travis Brown was shot. (38 RR at 12, 73, 97.)

22. Melanie Almaguer, one of the eyewitnesses, saw Applicant holding a gun in his hand after she heard the first two gunshots. (38 RR at 97.)

23. Esmerelda Lester, another eyewitness, saw Applicant holding a gun in his hand after hearing the first two gunshots. (38 RR at 12.)

24. Christopher Lentsch, another eyewitness, saw Applicant holding a gun in his hand as Applicant exited the room where Travis Brown had been shot. (38 RR at 73.)

25. Christopher Lentsch and Daniel Hibbard told Applicant to put the gun down. (38 RR at 12, 73.)

26. Applicant admitted to shooting Daniel Hibbard in the head. (39 RR at 69, 119.)

27. The medical examiner testified that Daniel Hibbard died from a gunshot wound to the head. (36 RR at 22.)

28. The bullet that caused the wound in Daniel Hibbard entered Daniel Hibbard's head at the left temporal region, traveled across Daniel's head mainly downward and slightly back to front, exited the upper part of Daniel's right neck, and grazed a little part of the skin on Daniel's right armpit. (36 RR at 23.)

29. Esmerelda Lester saw Applicant shoot Daniel Hibbard in the forehead. (38 RR at 13.)

30. Christopher Lentsch was present in the room where Daniel Hibbard was shot. (38 RR at 74.)

31. After hearing two shots from Travis Brown's room, Christopher Lentsch heard two more shots in the room where Daniel Hibbard was killed. (38 RR at 75.)

32. Christopher Lentsch was laying face down when he heard the two shots. (38 RR at 75.)

33. Christpher Lentsch did not hear anything from Daniel Hibbard after hearing the second two shots. (38 RR at 75.)

34. Applicant admitted to shooting Melanie Almaguer between the eyes. (39 RR at 114, 122.)

35. Esmerelda Lester saw Applicant point a

gun at Melanie Almaguer's face and shoot Melanie between the eyes. (38 RR at 13.)

36. Melanie Almaguer saw Applicant walk up to her and shoot her in the head. (38 RR at 98.)

37. The bullet paralyzed Melanie from the neck down. (38 RR at 99.)

38. Melanie Almaguer testified in a wheelchair that was capable of being adjusted to lean her back and prevent her blood pressure from stroking her out. (41 RR at 32-33.)

39. Applicant pointed a gun at Esmerelda Lester and told Esmerelda that it wouldn't hurt and she would not feel anything. (38 RR at 14.)

40. The gun jammed and Applicant attempted to fix the gun by poking at it with a picture. (38 RR at 14, 57, 75-76.)

41. Applicant was unable to fire the gun because there were no more bullets in the gun. (38 RR at 14, 57.)

42. Esmerelda begged for Applicant not to kill her so that she could bury her daughter, Melanie Almaguer. (38 RR at 5, 14, 75, 99; 39 RR at 124.)

43. Application voluntarily admitted that the reason he did not kill Esmerelda Lester was because she was screaming and hollering for Applicant to let her bury her daughter, Melanie Algamuer. (39 RR at 124.)

44. After the shootings, Applicant referred to himself under a name other than his own in front of Christopher Lentsch and Esmerelda Lester and Applicant told Christopher Lentsch and Esmerelda

Lester not to tell anyone what his name was.

45. Melanie Almaguer was still alive at this time and gurgling on her own blood. (38 RR at 16, 75.)

46. Applicant went back into Travis Brown's room and rummaged through the house and some drawers. (38 RR at 15, 57, 76, 100; 39 RR at 100-01.)

47. Applicant returned to the room where he had shot Daniel Hibbard and Melanie Almaguer to tell Christopher Lentsch and Esmerelda Lester not to tell anyone his name. (38 RR at 15-16; 76.)

48. Applicant admitted to stealing Travis Brown's car and using it to leave the house where Travis Brown and Daniel Hibbard had been killed. (39 RR at 100-01.)

49. Christopher Lentsch heard a car pull off shortly after Applicant left the house. (38 RR at 76.)

50. Christopher Lentsch saw that Travis Brown's car was gone when he looked outside. (38 RR at 76.)

51. Esmerelda Lester heard the car start outside and saw Applicant pulling out in Travis Brown's car. (38 RR at 16.)

52. Esmerelda Lester and Christopher Lentsch noticed that the house was on fire after Applicant drove off in Travis Brown's car. (38 RR at 17, 77.)

53. Lt. Daniel Dellasala, a state certificate arson investigator eliminated all natural and accidental causes for the fire. (37 RR at 113.)

54. Lt. Dellasala observe that an accelerant had been used to start a fire in Travis Brown's room. (37 RR at 113.)

55. Lt. Dellasala observed that a trail had been set for the fire from approximately three feet approximately from the door to the bedroom onto an air mattress. (37 RR at 113.)

56. Travis Brown received second-degree burns to the back of his head and arm that occurred post-mortem. (36 RR at 36.)

57. A lack of carbon monoxide in Travis Brown's lungs indicated that Travis Brown was not breathing at the time the fire started. (36 RR at 36-37.)

58. The door to Travis Brown's bedroom was locked and had to be forced open by rescuers. (36 RR at 157.)

59. Applicant told his girlfriend, Kimberly Callegeri, to tell police that Travis Brown had dropped him off at Kimberly Callegeri's aunt's house on the night before the morning of the murders in order to provide Applicant with an alibi to the murders. (35 RR at 91-94; 39 RR at 76.)

60. Kimberly Callegeri initially told the police the story that Applicant had told her to tell. (35 RR at 94-95.)

61. Applicant admitted that he told his girlfriend to lie for him. (39 RR at 76.)

62. As he was being arrested Applicant told his stepfather, Ralph Taylor, to tell the police that Applicant was home all night with his stepfather, Ralph Taylor. (36 RR at 82.)

63. Applicant also repeatedly slammed his head violently against the patrol car back window after he was placed into the patrol car with enough force to move the back door frame. (36 RR at 85.)

64. Applicant told Gregory Jackson, a fellow jail inmate, that the only thing Applicant resented was not killing everyone in the house. (38 RR at 121.)

65. Prior to Gregory Jackson's testimony, Applicant's lead counsel noted the overwhelming nature of the evidence by asking the prosecution rhetorically, "You are going to put him on with all of the stuff you already have?" (38 RR at 117.)

66. Applicant lied to the jury about his whereabouts at the time of the murders by initially claiming that he went to an unnamed friend's house and the later admitting that he had lied and had actually gone to the house where Travis Brown and Daniel Hibbard were killed. (39 RR at 48-49, 53.)

67. Applicant voluntarily admitted to being incarcerated for aggravated robbery and being placed on deferred adjudication probation for that offense prior to the murders after being asked general questions about his employment by trial counsel. (39 RR at 18.)

68. Applicant voluntarily offered information regarding past accusations against him for stealing animals and slapping his girlfriend. (39 RR at 12, 15.)

69. Applicant carried out this crime on his own without prompting, encouragement, or influence from any other person.

70. In committing the crime, Applicant

clearly formulated plans to not only commit the crime, but also to hide his responsibility for it.

71. Applicant also carried out his plans to commit the crime and hide responsibility for the crime.

72. Applicant's attempts to hide evidence and kill any witnesses to his crime, though clearly abhorrent and not socially acceptable, were nevertheless rational under the circumstances and not so indicative of impulsive behavior that it would amount to a sign of possible mental retardation.

73. Putting aside the heinousness and gruesomeness of Applicant's crime, the commission of the offense required forethought, planning, and complex execution of purpose.

74. Applicant's commission of the crime showed leadership as he commanded the situation from start to finish and acted alone, not at the prompting, encouragement, or under the influence of others.

75. In Applicant's commission of the crime, Applicant hid facts and lied effectively in his own interest.

Applicant's Claims of Mental Retardation

76. On July 27, 1999, Applicant's trial counsel, Ms. Phoebe Smith, consulted with a Dr. Kendrick about the case.

77. Prior to trial, Applicant was examined by two experts, Jesse Reed, III and an associate of Steven K. Martin.

78. Jesse Reed has a bachelor's degree in

sociology, a masters degree in rehabilitative counseling, a masters degree in clinical psychology, and a Ph.D in clinical psychology. (43 RR at 35.)

79. Dr. Reed did an internship for a year at the Baylor College of Medicine in Houston. (43 RR at 36-37.)

80. Dr. Reed worked for four to five years as an assistant professor of clinical psychology for the Department of Psychology at Baylor who had contracts to supply psychologists and psychiatrists to various mental health clinics in Houston to assist people returning to society from various mental institutions. (43 RR at 37.)

81. In addition to the counseling responsibilities attendant to his role as chief psychologist of one of these Houston clinics, Dr. Reed was also responsible for providing training for clinical psychology interns and also psychiatry residents. (43 RR at 37-38.)

82. Dr. Reed has been appointed by many judges in Harris and Fort Bend counties to interview and assist with individuals accused of crimes including capital murder and rape. (43 RR at 43.)

83. Dr. Reed has also been appointed by many judges in Harris and Fort Bend counties to work with victims of crime. (43 RR at 44.)

84. Prior to Applicant's trial, Dr. Reed had testified in other cases for both the State and the defense. (43 RR at 44.)

85. In this case, Dr. Reed was appointed by the trial court. (43 RR at 44.)

86. Prior to Applicant's trial, Dr. Reed had

been appointed many times by district court judges to determine if people accused of crimes are competent to stand trial. (43 RR at 47.)

87. Prior to Applicant's trial, Dr. Reed had been appointed many times by district court judges to determine if people accused of crimes were insane at the time of committing a crime. (43 RR at 47.)

88. Prior to Applicant's trial, Dr. Reed had been working in this field of clinical psychology for approximately twenty years and he has interviewed hundreds of people that have been accused of serious crimes such as capital murder. (43 RR at 50.)

89. Dr. Reed began working with people accused of crimes in 1985 when he worked with the Fort Bend County Juvenile Probation Department. (43 RR at 50-51.)

90. Dr. Reed personally met with Applicant three times, each time for an hour and a half. (43 RR at 55, 60.)

91. Dr. Reed testified that Applicant was unable to read, write, and obtain a basic educational foundation and this affected Applicant's self-esteem as early as the third grade. (43 RR at 56.)

92. Dr. Reed testified that Applicant began using drugs at the age of fourteen or fifteen years old which developed into drug abuse and a drug habit.

93. Dr. Reed testified that Applicant had been abusing marijuana that has been dipped in formaldehyde, commonly known as "fry," for approximately six years prior to the trial. (43 RR at 62.)

94. Dr. Reed testified that "fry" impairs a person's ability to think and it makes that person

aggressive, paranoid, and irrational. (43 RR at 63.)

95. Dr. Reed also testified that Applicant responds well when he is not under the influence of drugs, specifically fry, and he is able to respond in a rational manner. (43 RR at 63, 81.)

96. Dr. Reed also testified that Applicant functions well in structured environments like he did when he was in boot camp. (43 RR at 64.)

97. Dr. Reed also testified that Applicant's young age made him more open to change. (43 RR at 66.)

98. Dr. Reed testified that Applicant he was able to communicate with Applicant in that Applicant was honorable and trustworthy with Dr. Reed. (43 RR at 63.)

99. Applicant was examined by an unnamed associate of Stephen K. Martin with unknown qualifications, and Applicant was not examined by Stephen K. Martin himself.

100. Stephen K. Martin has a bachelor's degree in psychology and philosophy, a master's degree in clinical psychology, and a Ph.D in clinical Psychology.

101. Dr. Martin did a year internship in clinical psychology at the V.A. Medical Center in Dallas Texas prior to Applicant's trial.

102. Dr. Martin is currently a clinical neuropsychologist at the Tyler Rehabilitation Hospital in Tyler, Texas as well as an adjunct faculty member of the University of Texas Health Center at Tyler in Tyler, Texas.

103. Dr. Martin did not meet with Applicant, nor did he testify at Applicant's trial.

104. On August 21, 1999, Applicant's trial attorney, Phoebe Smith, met with Dr. Martin regarding the results of some neuropsychological tests performed on Applicant by Dr. Martin's unnamed associate.

105. Dr. Martin was of the opinion that Applicant had frontal lobe damage as a result of substance abuse that impaired Applicant's ability to think and function under stress.

106. Notes from Ms. Smith's meeting with Dr. Martin also reveal that the frontal lobe damage would not prevent Applicant from being able to function sufficiently to drive a car, but could (when combined with other factors) lead to a situation where Applicant would be unable to control his behavior.

107. Notes from Ms. Smith's meeting with Dr. Martin also reveal that Dr. Martin was of the opinion, just as Dr. Reed was, that Applicant would be less likely to act on impulse in a structured environment, free from drugs.

108. Dr. Martin's opinions are consistent with the opinions expressed by Dr. Reed during Applicant's trial.

109. Neither Dr. Reed nor Dr. Martin were of the opinion that Applicant was mentally retarded.

110. Dr. Reed also did not testify as if believed that Applicant was mentally retarded at the time Dr. Reed examined Applicant.

111. Applicant was able to correctly answer questions about his name, age, and family. (39 RR at

11-12.)

112. After Applicant lied to the jury, Steven Rosen explained Applicant's lies by making reference to Applicant's mental history and referring to an incident that occurred between Applicant, Applicant's trial counsel, and Applicant's mother. (39 RR at 50.)

113. Mr. Rosen requested a recess after Applicant lied citing Applicant's mental problems and a breakdown in communications. (39 RR at 51.)

114. The purpose for the recess was for Mr. Rosen to confer with Applicant which Mr. Rosen did during the recess. (39 RR at 51.)

115. After the recess and after Applicant had conferred with his attorneys, Applicant acknowledged to the jury that he had lied and apologized for his dishonesty. (39 RR at 52-53.)

116. During cross-examination, Applicant used his admission that he had lied in an attempt to gain credibility with the jury by stating, "If I wanted to lie, I could have kept going by that story, if I didn't ever want to tell the truth." (39 RR at 93.)

117. Applicant also explained to the jury that he lied about being at the murder scene on the night of the murders because, according to Applicant, it was hard for him to admit to committing the crime. (39 RR at 93.)

118. During cross-examination, Applicant was able to understand and respond not only to the questions that were asked of him, but also to the negative implications that the prosecution's questions carried. (39 RR at 86, 89, 90, 111, 121.)

119. During his trial, Applicant was able to

conform his conduct and his testimony to a question and answer format.

120. Applicant responded coherently, rationally, and on point and his responses did not wander from subject to subject.

121. Applicant was able to respond coherently, rationally, and on point to oral and written questions put to him by the numerous experts who examined him and his responses did not wander from subject to subject.

122. Writ counsel, Stephen Doggett and Logene Foster, did not have any difficulty communicating with Applicant.

123. During his trial, Applicant possessed and exhibited a rational and factual understanding of the proceedings against him. (39 RR at 52-53.)

124. During his trial, Applicant demonstrated his ability to consult with his attorney with a reasonable degree of rational understanding. (39 RR at 52-53.)

125. Applicant was diagnosed as having a learning disability while he was enrolled in public school.

126. Applicant was not diagnosed as being mentally retarded while he was enrolled in public school.

127. Applicant's IQ test results in 1991 demonstrated that he had a full scale IQ of 79.

128. The IQ test administered to Applicant in 1991 was still a valid test regardless of whether Applicant's expert, Dr. Gilda Kessner, would have, in

her practice, used another version of the test that came out the same year.

129. Even under Applicant's expert's re-evaluation of Applicant's 1991 IQ test scores, Applicant still had an IQ of 70 or greater and as high as 74 in light of the rate of error on the test, indicating a general intellectual functioning level that was low, but not significantly sub-average during the developmental period.

130. Additionally, Applicant's low scores on the test could have been due to his learning disability and a racial bias inherent in the IQ test that traditionally over-identifies African-Americans as having low IQs.

131. During his developmental years, everyone treated Applicant as though he suffered from a learning disability and not as though he was mentally retarded.

132. No one who knew Applicant during the developmental stage acted in accordance with a determination that Applicant was mentally retarded.

133. Applicant was often placed in charge of his siblings while his parents were away which was conduct that was not in accordance with a determination or belief on the part of family or friends that Applicant was mentally retarded.

134. Applicant was not only able to cook for himself, he often cooked by himself for his younger siblings which was conduct that was not in accordance with a determination or belief on the part of family or friends that Applicant was mentally retarded.

135. Applicant was able to maintain employment and run a grill at a restaurant.

136. Applicant routinely held down several jobs at one time and even started his own business of mowing lawns in his neighborhood.

137. Applicant's proficiency as a "rapper" during the developmental stage indicated an ability to communicate orally on a sophisticated level.

138. Applicant's mother, Lucille Taylor testified at the post-conviction writ hearing in a manner that was inconsistent with her earlier testimony during the trial.

139. Applicant's mother's testimony during the trial of the case demonstrated that she acted in accordance with a belief that Applicant was not mentally retarded.

140. The conflicts in Applicant's mother's testimony and her demeanor in answering questions at the post-conviction hearing, her testimony at the hearing lacked credibility.

141. Applicant took it upon himself to assist a stranded motorist and change that motorist's tire which was conduct that demonstrated that he was capable of conduct that required planning, forethought, and complex execution of purpose.

142. Applicant's poor performance in school was due to his learning disability, his lack of attendance, his exceedingly disruptive behavior, his lack of respect for authority, and his unwillingness to participate in school work.

143. Applicant could have performed better in school if he had attempted his assignments and

studied.

144. Applicant's poor performance in school was not due to any deficits in adaptive behavior or significant sub-average general intellectual functioning.

145. Applicant failed to get a G.E.D. because he did not complete the requirements, not because his work was unsatisfactory.

146. Applicant's conduct in stealing dogs demonstrated forethought, planning, and complex execution of purpose.

147. Applicant's conduct in stealing dogs demonstrated leadership and planning as Applicant was the person who initiated the practice of stealing dogs and then he entered into a partnership with George Moseley to gain assistance.

148. George Moseley's testimony was inconsistent with the testimony of William Bryant and Patience Smith and therefore the credibility of all of their testimony was called into question.

149. Applicant may not have been as motivated to bathe himself, but there was no evidence that indicated an inability to bathe, groom, or dress himself.

150. No one had to dress, bathe or groom Applicant while he was teenager.

151. Applicant was able to bathe, groom, and dress himself enough to attract more than one girlfriend.

152. Patience Smith found Applicant emotionally and physically attractive, had an emotional

and physical relationship with him, had sex with him, and had a child with him.

153. Patience Smith and Applicant discussed getting married and even made plans to get jobs together provide for the future of their child.

154. Applicant had a total of three girlfriends at the time he was seeing Patience Smith.

155. Applicant was having sexual relations with more than one woman.

156. Applicant was able to effectively hide the details of his relationships from his mother, Lucille Taylor.

157. Applicant was able to effectively hide evidence of his drug use and his crimes from several people including his mother and his girlfriend, Patience Smith.

158. Applicant's participation in an armed robbery wherein he used a gun and controlled the crowd during the robbery indicated that he was capable of forethought, planning, and complex execution of purpose.

159. The selection of Applicant as the person to use the gun and control the crowd during the robbery demonstrated that the people who knew him well did not act in accordance with a belief that Applicant was mentally retarded.

160. James Patton rendered no opinion regarding Applicant's mental health status.

161. James Patton's opinion, if any, regarding the significance of the transcript of Applicant's trial testimony was meaningless as James Patton

himself indicated he was unable to formulate an opinion without more information.

162. Applicant's testimony and demeanor in court during the trial was a significant indicator that Applicant was not acting with a significant sub-average level of intelligence or significant deficits in adaptive skills.

163. Applicant's videotaped statement that he made while in prison after viewing a victim impact statement from Melanie Almaguer indicated a coherent, rational, and on point response to an oral statement.

164. Applicant's decision to make a videotaped statement after viewing Melanie Almaguer's victim impact statement upon the condition that it not be used against him demonstrated a sophisticated level of thinking that was a rational and appropriate response to external stimuli.

165. Applicant was administered an IQ test after he was convicted of capital murder by Dr. Gilhousen who works for the Texas Department of Criminal Justice.

166. Dr. Gilhousen was of the opinion that Applicant suffered from a learning disability and that he was not mentally retarded.

167. Dr. Gilhousen was of the opinion that Applicant's low IQ score was due to Applicant's significant drug use.

168. The people who observed Applicant in prison indicated that Applicant appeared to have average or normal intelligence.

169. Dr. Gilda Kessner's answers to many

questions during the hearing on the post-conviction writ were evasive and non-responsive.

170. Dr. Gilda Kessner based her opinion regarding Applicant's mental health status in part upon information that lacked credibility, such as the testimony of Applicant's mother.

171. Many of the test questions that Dr. Gilda Kessner described to this Court demonstrated significant room for subjective valuation on the part of the test administrator and did not provide a reasonably objective indication of potential intellectual functioning.

172. Many of the answers that Applicant allegedly scored incorrectly on the test questions demonstrated or described to this Court indicated a rational and intelligent response to vague and multifarious questions.

173. Dr. Kessner's investigation focused upon ruling out Applicant's mental retardation rather than upon an independent examination of whether or not Applicant was mentally retarded.

174. While Dr. Kessner utilized several standardized psychological tests to determine Applicant's general intellectual functioning, Dr. Kessner used none of the same standardized protocols available for testing Applicant's adaptive behavior such as the Vinland Adaptive Behavior Scale or the AMR Adaptive Behavior Scale.

175. Dr. Kessner indicated that Applicant would have to have obtained a college degree for her to have ruled out her opinion that Applicant was mentally retarded.

176. Dr. Kessner indicated that she believed she had sufficient information to render an opinion regarding Applicant's mental health status.

177. Dr. Kessner demonstrated during the hearing that she recast the testimony that she had heard during the hearing to fit her diagnosis of mental retardation such as when she testified that Applicant had stood outside the George R. Brown Convention Center during a graduation ceremony when the testimony actually indicated that Applicant had stated he had gone inside the George R. Brown Convention Center to look for his friends.

178. There was no evidence that Applicant actually stood outside the George R. Brown Convention Center during the graduation ceremony other than Applicant's own statements to Patience Smith.

179. Dr. Kessner indicated that Applicant's misunderstanding of the meaning of the word "reckless" during his testimony at trial was a possible sign of mental retardation even though she herself did not know the meaning of the word "reckless."

180. Dr. Kessner also based her opinion upon affidavits without any indication of how the affidavits were prepared or what questions were asked of the people who made the statements in the affidavits.

181. Applicant did not have a significantly sub-average general intellectual functioning prior to his 18th birthday or during his developmental period.

182. Applicant did not have deficits in adaptive functioning related to a sub-average general intellectual functioning occurring prior to his 18th

birthday or during his developmental period.

183. Any mental deficiencies that Applicant had were due to his voluntary, prolonged substance abuse.

184. The people who knew Applicant best during the developmental stage such as his family, friends, teachers, employers, and authorities did not think Applicant was mentally retarded during the developmental stage.

185. The people who knew Applicant best during the developmental stage such as his family, friends, teachers, employers, and authorities did not act in accordance with a determination or belief that Applicant was mentally retarded during the developmental stage.

186. Applicant's conduct indicates that he has been able to formulate plans and carry them through.

187. Applicant's conduct has shown leadership.

188. Applicant's conduct in response to external stimuli has been rational and appropriate regardless of whether the conduct was socially acceptable.

189. Applicant has responded coherently, rationally, and on point to oral and written questions and his responses have not wandered from subject to subject.

190. Applicant has hidden facts and lied effectively in his own interest.

191. The commission of this offense, despite

its heinousness or gruesomeness, required forethought, planning, and complex execution of purpose.

CONCLUSIONS OF LAW

Applicant has failed to establish by a preponderance of the evidence that he is mentally retarded under the definitions set out in Ex parte Briseno, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004). Specifically, Applicant has failed to establish by a preponderance of the evidence that he has significant sub-average general intellectual functioning that is concurrent or accompanied with deficits in adaptive behavior that originates prior to the age of 18. Briseno, 135 S.W.3d at 15. More generally, Applicant has failed to establish by a preponderance of the evidence that his mental deficiencies are such that there is or would be a national or statewide consensus of citizens that Applicant lacks the moral culpability necessary to receive the death penalty. Briseno, 135 S.W.3d at 11-12.

1. Applicant has not been denied due process as this Court has afforded him ample time and opportunity to develop a record on his claims of mental retardation particularly, though not exclusively, in light of Applicant's own expert's testimony that she had enough information to render her opinion that Applicant was mentally retarded.

2. Applicant has failed to establish by a preponderance of the evidence that he had significantly sub-average general intellectual functioning accompanied by related limitations in adaptive functioning, the onset of which occurred prior to the age of 18. Ex parte Briseneo, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004).

3. Even if Applicant established by a preponderance of the evidence that he had significantly sub-average general intellectual functioning, Applicant nevertheless failed to establish by a preponderance of the evidence that his intellectual functioning was accompanied by related limitations in adaptive functioning, the onset of which occurred prior to the age of 18. Ex parte Briseneo, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004).

4. Even if Applicant established by a preponderance of the evidence that he had significantly sub-average general intellectual functioning and that functioning was accompanied by limitations in adaptive functioning, Applicant nevertheless failed to establish that the onset of these limitations occurred prior to the age of 18. Ex parte Briseneo, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004).

5. Even if Applicant established by a preponderance of the evidence that had deficits in adaptive behavior, Applicant failed to establish by a preponderance of the evidence that he had significantly sub-average general intellectual functioning prior to the age of 18. Ex parte Briseneo, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004).

6. Applicant has also failed to establish by a preponderance of the evidence that he had significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originated during the developmental period. Ex parte Briseneo, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004).

7. Even if Applicant has established by a preponderance of the evidence that he had signifi-

cantly sub-average general intellectual functioning, Applicant nevertheless failed to establish that these deficits in intellectual functioning were concurrent with deficits in adaptive behavior and originated during the developmental period. Ex parte Briseneo, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004).

8. Even if Applicant has established by a preponderance of the evidence that he had significantly sub-average general intellectual functioning and that these deficits in intellectual functioning were concurrent with deficits in adaptive behavior, Applicant has nevertheless failed to establish by a preponderance of the evidence that these deficits originated during the developmental period. Ex parte Briseneo, 135 S.W. 1, 15 (Tex. Crim. App. 2004).

9. Even if Applicant has established by a preponderance of the evidence that he had deficits in adaptive functioning that originated during the developmental period, Applicant has nevertheless failed to establish by a preponderance of the evidence that he had significantly sub-average general intellectual functioning that originated during the developmental period. Ex parte Briseneo, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004).

10. Applicant has failed to demonstrate by a preponderance of the evidence that he is mentally retarded for purposes of the Eighth Amendment's ban on excessive punishment. Ex parte Briseneo, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004).

11. Even if Applicant had established by a preponderance of the evidence that he met the psychological definition of mental retardation, Applicant has failed to establish that those mental deficiencies

diminished his moral culpability for his crimes. Consequently, Applicant has failed to establish that due to his alleged mental deficiencies his sentence amounted to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. Atkins v. Virginia, 535 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); Ex parte Briseno, 135 S.W.3d 1, 11-12 (Tex. Crim. App. 2004).

12. Even if Applicant had established by a preponderance of the evidence that he met the psychological definition of mental retardation, Application has failed to establish that his sentence amounted to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution because any latent mental deficiencies were caused by Applicant's own substance abuse and therefore those deficiencies did not lessen his moral culpability. Atkins v. Virginia, 535 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); Ex parte Briseno, 135 S.W.3d 1, 11-12 (Tex. Crim. App. 2004).

SIGNED this the 4th day of January, 2006.

/s/ Brady Elliott
Hon. BRADY ELLIOTT
Presiding Judge

[SEAL OF DISTRICT COURT, FORT BEND COUNTY, TEXAS]

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MILTON MATHIS, Petitioner,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. _____
NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent.	§	

PETITION FOR A WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

MILTON WUZAEL MATHIS,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. _____
	§	
NATHANIEL QUARTERMAN, DIRECTOR,	§	
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,	§	
Respondent.	§	

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Milton Wuzael Mathis asks this Court to issue a writ of habeas corpus and grant him relief from his unconstitutional death sentence. Because he is mentally retarded, his execution would violate the Eighth and Fourteenth Amendments to the United States Constitution, *Atkins v. Virginia*, 536 U.S. 304 (2002), and he is entitled to federal habeas relief.

PROCEDURAL HISTORY

Mr. Mathis was tried by a jury and convicted of capital murder in the 268th District Court of Fort Bend County, Texas. Clerk's Record Vol 2, 202. The jury then returned answers to special issues submit-

ted under Tex. Code Crim. Proc. art. 37.071 which required imposition of the death penalty. Clerk's Record Vol 2, 219-20. On September 21, 1999, the trial court entered the judgment and sentence of death. On February 13, 2002, the Court of Criminal Appeals affirmed the conviction and death sentence in *Mathis v. State*, 67 S.W.3d 918 (Tex. Crim. App. 2002).

Mr. Mathis filed his first application for writ of habeas corpus on February 6, 2001. The trial court entered findings of fact and conclusions of law, recommending denial of relief, and the Court of Criminal Appeals denied relief on April 3, 2002.

Mr. Stephen Doggett and Mr. Winston Cochran were appointed by the federal district court to represent Mr. Mathis in federal habeas corpus proceedings. Order Granting Motion for Appointment of Counsel, *Mathis v. Dretke*, No. 03-cv-01138 (S.D. Tx. 4/29/02). On April 3, 2003, Mr. Mathis filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas. *Id.* On June 20, 2003, while the federal proceeding was pending, Mr. Mathis filed a second state application for writ of habeas corpus in the trial court and the Court of Criminal Appeals raising an *Atkins* claim.[1] Shortly thereafter, the Court of Criminal Appeals ordered briefing in another subsequent habeas case proceeding, *Ex parte Soffar*, WR-29,980-02, on whether the two forum rule, also known as the *Powers* doctrine, should be modified to permit considera-

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[1] Under the "two-forum rule" in effect at that time, the Court of Criminal Appeals was required to dismiss a successive habeas application if a proceeding related to the same case or matter was pending in a federal court. *See Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972).

tion of the merits of a subsequent writ if the federal court stayed its parallel proceedings. On February 11, 2004, the Court of Criminal Appeals modified its two forum rule to permit consideration of a subsequent application provided the federal court stayed all proceedings related to the same case or same matter. *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004). On March 3, 2004, the Court of Criminal Appeals dismissed Mr. Mathis' *Atkins* application under *Soffar* because he had not shown that the federal court had stayed its proceedings.

On February 2, 2004, before the *Soffar* decision, the federal district court denied Mr. Mathis' federal habeas petition. After the *Soffar* decision and before the state application was dismissed, Mr. Mathis filed in the federal court a motion for new trial and a motion for abatement of the federal proceedings pending the completion of the state court successor application based on *Atkins*. *Mathis v. Dretke*, 03-cv-01138 (S.D. Tex.) (Docket Entry #19, filed February 17, 2004). Shortly thereafter, on March 11, 2004, the federal district court denied the motion for abatement based on the erroneous conclusion that Texas law no longer precluded consideration of a subsequent application during the pendency of federal proceedings related to the same case or matter. *Id.* at Docket Entry #20.

Mr. Mathis appealed the federal district court's decision. While the appeal was pending, the trial judge scheduled Mr. Mathis' execution for April 20, 2005. Mr. Mathis filed a motion for stay of execution in the Fifth Circuit and also asked the federal court to stay the appellate proceedings so that he could pursue his *Atkins* claim in state court. On

March 11, 2005, this Court refused to stay the proceedings and denied the appeal. *Mathis v. Dretke*, No. 04-70015 (5th Cir. Mar. 11, 2005). Rehearing was denied on April 8, 2005.

The Texas Court of Criminal Appeals granted a stay and remanded the case for further proceedings on April 19, 2005. A hearing was held in the district court in September 2005 and the district court entered findings of fact recommending a denial of Mr. Mathis's claim in January of 2006. On September 20, 2006, the CCA adopted the trial court's recommendation and denied relief to Mr. Mathis.

JURISDICTION

Because Mr. Mathis was convicted and sentenced to death by a jury in the 268th District Court, Fort Bend County, Texas, this Court properly exercises its habeas jurisdiction over this matter pursuant to 28 U.S.C. § 2241(d).

CLAIM FOR RELIEF

I. BECAUSE MR. MATHIS IS MENTALLY RETARDED, HIS EXECUTION WOULD VIOLATE THE RULE SET FORTH BY *ATKINS V. VIRGINIA*.

A. *Atkins v. Virginia* Establishes Mr. Mathis' Mental Retardation as a Ground For Habeas Relief.

Reversing its prior decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the Supreme Court concluded that "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (internal quotation marks omitted). The Court

declined to impose a uniform definition of mental retardation, and instead left to the states the task of defining retardation and implementing suitable procedures to adjudicate *Atkins* claims. *See id.* at 317. In footnotes 3 and 22 the Court noted that although it did not endorse a particular statutory formulation of mental retardation, each state's standard must generally embody the three clinical criteria shared by the American Association on Mental Retardation ("AAMR") and American Psychiatric Association ("APA") definitions of that condition. *See id.* at 309 n.3 (setting forth the AAMR and APA definitions); *id.* at 317 n.22 ("The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in [footnote] 3 . . . .").

B. A Person is Mentally Retarded if He Has Intellectual Impairment and Adaptive Deficits That Developed Before Age 18.

Atkins does not require states to use a specific definition of retardation, but it does require that any definition contain three clinical elements: (1) significantly subaverage intellectual functioning ("intellectual impairment"), (2) significant limitations in adaptive skills ("adaptive deficits"), and (3) onset of those conditions prior to age 18 ("developmental onset"). 536 U.S. at 318 ("*[C]linical* definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.") (emphasis added). Most clinical formulations differ only with respect to what conditions satisfy the second, adaptive deficits criterion. *See, e.g.*,

id. at 308 n.3 (describing the differences is the AAMR and APA diagnoses of adaptive deficits).

The AAMR promulgated nationally recognized clinical definitions of mental retardation in 1992 and again in 2002. *See* AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (10th ed. 2002) (hereinafter "2002 AAMR Manual" or "2002 Manual"); AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) (hereinafter, "1992 AAMR Manual" or "1992 Manual"). According to the more recent AAMR definition, a diagnosis of mental retardation requires: (1) significantly subaverage general intellectual functioning (*i.e.*, an IQ of approximately 70 to 75 or below); (2) the presence of "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical skills" ("adaptive deficits"); and (3) the condition's onset prior to the age of 18. 2002 Manual at 1.

The APA employs a definition that is nearly identical to the one set forth in the 1992 AAMR Manual, and one that differs from the 2002 AAMR Manual only in the technical manner in which adaptive deficits are defined. *Compare* APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000) ("DSM-IV") (requiring adaptive deficits in at least two of eleven specified skill areas), *with* 2002 AAMR Manual at 1 (requiring significant deficits in at least one of three major skill "domains"), *and* 1992 AAMR Manual at 1 (requiring deficits in one of ten specified skill areas).

C. Mr. Mathis is Mentally Retarded.

The only experts to testify in Mr. Mathis's state post-conviction proceedings were Dr. Gilda Kessner, a Texas licensed psychologist with many years experience doing forensic evaluations, *see* Exhibit 1 (Kessner CV) and Dr. James Patton, an adjunct professor in the Special Education Department of the University of Texas who, in addition to many years of working with persons with mild mental retardation, is the author of myriad articles, treatises and textbooks on mental retardation. *See* Exhibit 2 (Patton CV). The state presented no expert evidence at all.

To evaluate Mr. Mathis, Dr. Kessner personally administered five different standardized tests, including the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"), the Wide Range Achievement Test – 3rd ed. ("WRAT-3"), the Kaufman Functional Academic Skills Test ("KFAST"), the Mini Mental State Examination ("MMSE"), and the Rey 15-Item Memory Test ("RMT"). S.H. 7: 8.

She also considered prior intelligence testing and scoring completed in 1991 and 2000, analyzed his high school and other school records, interviewed Mr. Mathis for a full day at the Fort Bend County jail, reviewed affidavits, and obtained first-person testimony regarding all three APA/AAMR clinical criteria. Dr. Kessner concluded that Mr. Mathis was mentally retarded. S. H. 7:118.

Dr. Patton explained to the court the features of mild mental retardation and how mildly mentally retarded individuals could live largely independent and functional lives. S.H. 2:94-98. Dr. Patton also re-

viewed a videotaped interview of Mr. Mathis and Mr. Mathis' trial testimony and found nothing in what he reviewed that would be inconsistent with a diagnosis of retardation. S.H. 2: 130.

1. Mr. Mathis' Significant Intellectual Impairment Has Been Confirmed by the Most Reliable IQ Testing.

The first clinical criterion asks whether Mr. Mathis has significantly subaverage intellectual functioning. To be considered mentally retarded, a person's cognitive abilities must be roughly two standard deviations below the population average, as measured by standardized intelligence tests. *See* DSM-IV at 41; 1992 AAMR Manual at 5. A person with an IQ of 70 to 75 or lower will satisfy this criterion and will fall in the bottom 3% of intellectual functioning among the general population. *See Atkins*, 536 U.S. at 309 n.5 (citing 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (B. Sadock & V. Sadock eds. 7th ed. 2000)).

Mr. Mathis scored a full-scale 64 on the WAIS-III IQ test administered by Dr. Kessner. S.H. 7: 43. The WAIS-III is a collection of several sub-tests that measure verbal intelligence, "performance" intelligence, and a verbal-performance composite that is called the "full scale" IQ. The full scale IQ is the most reliable measurement for mental retardation because it is deemed the best measure of human intelligence. 2002 AAMR Manual at 51, 55-56. The Supreme Court considers the WAIS-III examination to be "the standard instrument in the United States for assessing intellectual functioning." *Atkins*, 536 U.S. at 309

n.5. In habeas proceedings, the WAIS-III is considered the "gold standard, i.e., the most reliable test to determine [a petitioner's] IQ." *See Rivera v. Dretke*, No. B-03-139, 2006 WL 870927, at *24 (S.D. Tex. Mar. 31, 2006).

Prior testing confirms the reliability of Mr. Mathis' WAIS-III score. Testing conducted in 2000 – before the United States Supreme Court decision in *Atkins* – by Texas Department of Criminal Justice ("TDCJ") psychologist Dr. Gilhousen resulted in a full-scale IQ score of 62. S.H. 7: 78-79. Dr. Gilhousen's testing results are consistent with Dr. Kessner's but Gilhousen could not make a definitive diagnosis of mental retardation without further information regarding Mr. Mathis' adaptive deficits. S.H. 7: 81.

In 1991, at the age of 12, Mr. Mathis obtained a score of 79 on a Weschsler Intelligence Scale for Children, Revised ("WISC-R"). *Id.* at 67. This obtained score is outside the range of the mental retardation intellectual functioning prong and appears to be inconsistent with Mathis' other IQ scores reflecting scores in the mid-60's. The obtained score, however, must be adjusted for the Flynn Effect, a scientifically recognized phenomenon in which people are observed to perform better on IQ tests over time as the norm for the test ages. The Flynn Effect, as a general principle, suggests that scores rise approximately .3 per year. S.H. 7:224. This .3 rise, however, is an average based upon various tests and a wide range of tested subjects. In Mr. Mathis' case, Dr. Kessner was able to be much more specific. Relying on a validity study that was conducted with respect to the WISC-R in 1991 (the same year Mr. Mathis

took the test) and cited in the 2002 AAMR Manual, Dr. Kessner testified that his obtained score would actually correspond to a true score of about 70. S.H. 7: 74-76; 221. *See also* 2002 AAMR Manual at 61.

The confidence intervals and margin of error for all three tests indicate that Mr. Mathis' IQ is in the range of mild mental retardation. Based on the statistically derived confidence intervals for the WAIS-III, Dr. Kessner's testing demonstrated a 95% probability that Mr. Mathis' IQ falls between 61 and 69. S.H. 7: 43. Accounting for the standard error of measurement (generally accepted to be +-5 points), Mr. Mathis' 1979 testing places his IQ between 65 and 75 and his prior prison testing reveals an IQ between 57 and 67. S.H. 7: 77-78. Because the range of scores on all three tests overlapped (i.e. the range between 65-67), Dr. Kessner testified that this consistency demonstrated higher confidence in the results of the testing. 7 RR 82.

2. Mr. Mathis has Adaptive Deficits Indicative of Mental Retardation.

The second criterion requires that a person's intellectual impairment be accompanied by adaptive deficits. The requirement that a person be unable to "cope with common life demands" restricts the class of mentally retarded persons to those whose disability subjects them to tangible adaptive limitations. *See* 1992 AAMR Manual at 5, 38; DSM-IV at 42. According to the 2002 AAMR Manual, the significant limitations in adaptive functioning are expressed in "conceptual, social, and practical adaptive [domains]." 2002 AAMR Manual at 73.

The APA's list of skills for conducting the adaptive deficits inquiry is almost identical to that contained in the 1992 AAMR Manual. The DSM-IV definition requires that any mentally retarded person have limitations in at least two of eleven skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health, safety, functional academics, leisure and work. DSM-IV, at 41. The definition of adaptive deficits in the 1992 AAMR Manual is almost identical, requiring limitations in at least two of ten skill areas: communication, functional academics, self-direction, academics, social skills, leisure, self-care, home living, community use, health and safety, and work. 1992 Manual at 1.

The 2002 Manual revised the AAMR framework for conducting the adaptive deficits inquiry. It requires that, for an individual to be considered mentally retarded, his adaptive deficits must be "significant." 2002 Manual at 1. "Significance" can be established by the presence of limitations in one of the three specific domains – conceptual, social, or practical. *Id.* at 74, 77-78. The 2002 Manual delineates "representative skills" in each of these three adaptive domains, and each of the ten skills from the 1992 Manual fits within at least one 2002 domain. *See* 2002 AAMR Manual, Table 5.2. Often times a mentally retarded individual will have strengths in one aspect of a domain for which he experiences a net limitation. *Id.* at 8.

Mr. Mathis exhibits significant limitations in each of the three 2002 AAMR domains and in at least six of the APA/1992 AAMR skill areas (communication, self-care, social/interpersonal skills, func-

tional academics, leisure, and work). Relying on Mr. Mathis' school records, affidavits of and interviews with persons who knew Mr. Mathis during the developmental period, interviews with professionals who had observed him, and observations during an interview, Dr. Kessner conducted a comprehensive analysis of Mr. Mathis' adaptive deficits.

a. **Mr. Mathis' Conceptual Deficits**

i. **Lifelong poor academic performance**

Mr. Mathis has exhibited consistently poor academic performance throughout his life. In elementary school, Mr. Mathis flunked the first grade, was placed in resource classes in second or third grade, and flunked the fifth grade but was placed in sixth grade because of prior failures and an apparent concern for his age. Exhibit 3 (Windsor School Records). By the time he got to middle school, Mr. Mathis was placed in special education classes starting in the 8th grade. Exhibit 4 (Middle School records). Nevertheless, he flunked the 9th grade, and dropped out of school mid-way through his second year of 9th grade.

Adults in Mr. Mathis' life realized that his chronic difficulties in school stemmed from an inability to understand and/or to master simple academic skills such as reading, writing, and math. His mother, who was reluctant to recognize her son's disability, was often told that her son's problems were serious, and tried to help her son learn basic academic skills:

> Milton had a hard time in school. He failed first grade, and he was in resource classes

> starting in second or third grade. Milton's reading skills were always bad. All through school his handwriting was terrible. I used to try to teach him, but it was hard for him. If he had to write something that was a couple of paragraphs long, he couldn't do it. Even simple math was hard for him. I don't think Milton could count to a hundred.

Exhibit 5 (Affidavit of Lucille Taylor).

Mr. Mathis mother again reiterated her concerns about her son's academic performance in hearing testimony. She said that in comparison to her other children, Mr. Mathis was "slower in learning simple stuff like math". S.H. 7:46.

Other adults in Mr. Mathis' life similarly observed an inability to perform simple academic tasks that other children, even much younger, mastered quite easily. Mr. Mathis' aunt recalled:

> Milton was not as smart as other kids. My daughter was brighter than he was, and she was seven years younger. My daughter could catch on to things a lot faster than Milton could, even simple things, like adding and subtracting and reading and spelling. When they would be doing homework together, my daughter and other kids could get it but Milton couldn't. I would see him try to read sometimes when he was a teenager, and he was like a beginner. He couldn't write or spell simple things that other kids could. He would get very frustrated sometimes, throw his homework on the floor, because he was trying but he just couldn't get it. I don't think there's any

> way Milton could count to a hundred, maybe to twenty without error.

Exhibit 6 (Affidavit of Mable Smith).

A family friend of Mr. Mathis' mother recalled similar academic difficulties:

> Milton had a hard time with his homework. I know that he was held back in the first grade and I think several times after that. I also know that his mother would place him in the next grade, even when he wasn't ready to move on. Milton and his brothers used to be at my house a lot, and I would try to help him with his homework, but I just didn't have the patience. It took him so much longer than it took my boys, and he had trouble reading even simple words. When he would read out loud, he would skip words that he didn't know, and it would all come out not making sense, and he would get frustrated. If you gave Milton a couple of paragraphs to read, he couldn't do it, no way, not even when he was an older teen. I used to try to get him to do better, I told him I would buy him some Jordans that he wanted – tennis shoes that all the kids want – and I would have too. I told him he had to get his grades up, and he really tried. He would show me homework that he did and got back, but I would tell him he had to wait until his report card came out, he had to pass, but he just couldn't do it. My children's daddy, my husband at the time, he had a lot more patience than either me or Lucille, he would sit with him and go over everything and spend the time that Milton needed. It took him a lot

longer to learn.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4: 41-42.

ii. ***Inability to manage or count money***

Mr. Mathis' academic deficits affected his ability to manage, and even to count, money. From the time Milton Mathis was a young teenager, he got jobs outside the home. It was through one of these job experiences that Lucille Taylor, Mr. Mathis' mother, first realized that he was unable to count money:

> When Milton was in his teenage years, he got different jobs to try to help out. He worked for a barbeque stand called Jones Barbeque for a guy named Curtis. Curtis is the one who first told me that Milton couldn't count change, and I didn't believe it at first. He said that he had watched him with customers, and he didn't know how much change to give back. Curtis said that he would still let Milton work there, but he couldn't be left alone, and he couldn't deal with the money. So Milton made the sandwiches. After I realized that, I tried to teach him, and he could tell you what a quarter or a dime or a dollar was, but when it came to figuring out how much money to give someone for something, it was hard for him. So I was more careful after that. If he went to get a soda, I counted out the change for him so he wouldn't get beat out of his money. When Milton got paid at work, he would bring me his check and say it was for me. I would tell him it

> was for him, and I would go with him to cash the check. He didn't have a checking account, and couldn't manage money. One of us would go with him a lot of times to buy clothes or whatever it was he wanted. If he was going on his own to buy something, I would have him ask how much it was, then I would give him the right amount of money. When I gave him money from his check, I would tell him how much it was, I would tell him "here's twenty dollars," so he would know what he had and wouldn't get beat out of his money.

Exhibit 5 (Affidavit of Lucille Taylor).

Geneva Parker, a close family friend, similarly tried to teach Mr. Mathis simple money skills:

> He couldn't count change either. I used to tease him and tell him that he couldn't get an ice cream cone unless he could count out the change, and as soon as you got anything more complicated than two quarters, as soon as you added in dimes and nickels, he couldn't count it out. And he was 14, 15 years old. I tried to teach him too, but he just couldn't understand it.

Exhibit 7 (Affidavit of Geneva Parker); *see also* SH 4:43.

Patience Smith, the mother of Mr. Mathis' daughter Treasure, worked with Mr. Mathis at the Astrodome in Houston. Ms. Smith also noticed serious problems with Mr. Mathis' ability to count and manage money, as required by the job:

> When he [Mr. Mathis] went to count money at

> the end of the night, he would come up short and they told him that this could not continue. He could not understand why he kept on coming up short, he said that he was counting the money. He asked me to stay close to him in order to help him with the money counting.

S.H. 4:82.

iii. ***Receptive and expressive language deficits***

Adults in Mr. Mathis' life uniformly commented on Mr. Mathis' apparent inability to understand direction without repetition. Adults described Mr. Mathis as different from other children in the sense that adults had to repeat directions to him, and most believed that he was not understanding or remembering what had been said. According to Milton Mathis's mother:

> Milton was forgetful. If I told him to clean his room or take his lunch, he would tell me later he forgot, and I think a lot of the times he did forget. If I sent him somewhere with a message, he would often forget, so I would sometimes give him notes with my messages. He tried to play football, but I think he got kicked off the team for not following directions.

Exhibit 6 (Affidavit of Lucille Taylor).

Geneva Parker similarly recalled:

> When Milton was 14 or 15 years old, his Momma lived a couple of street over from me. His Momma would send him over with a message for me, and he would get inside and start to tell me, but then he would realize he forgot

> what he was supposed to tell me. So he would go back to get the message again, and come back, and even then sometimes he would forget. His mom got so she would write me a note, and send it to me in his pockets, and then call me to tell me to remind him to give it to me. We would laugh about his forgetfulness.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4: 46.

His aunts recall that he would forget simple things, like the name of the corner store. His maternal Aunt Mable recalled:

> Around the house, when Milton had to clean up, he was sloppy. Often if you told him to do something you had to tell him more than one time, you had to repeat and repeat with Milton, and honestly, a lot of the time it seemed like he didn't get it.

Exhibit 6 (Affidavit of Mable Smith).

Mr. Mathis' ex-girlfriend, Patience Smith remembered Mr. Mathis' difficulties when attending a graduation ceremony at the George R. Brown Convention Center in Houston. Despite being instructed how to find Ms. Smith, Mr. Mathis was unable to find his seats. When asked by Ms. Smith why he had not asked an attendant for directions, he replied that he had not thought of it. Moreover, Ms. Smith expressed amazement that he failed to realize that the ticket he held gave the seat location he sought:

> The ceremony was about an hour to an hour and a half. He waited outside the whole time I was there. He has a ticket showing where we

> were supposed to be sitting but he still could not find us.

S.H. 4:74.

William Bryant, another friend during adolescence, testified that Mr. Mathis had problems remembering how to saddle a horse, despite repeated instructions from Mr. Bryant:

> He would forget to put a blanket under the saddle, so everyday I had to show him how to saddle up, but I mostly did it for him. It was quicker that way. It was not rocket science. It sometimes made me angry when I thought he was just playing about, but then I realized that he was being serious and was having serious problems with it.

S.H. 5: 15-18

Mr. Mathis also had problems with expressive language skills and came across as stand-offish and soft-spoken as a teenager:

> He couldn't talk very well, you'd ask him something, like why we wasn't playing with the other kids, and he shrug and kind of slur the words, I-dunno, and you couldn't get him to talk and express himself. He would stand and fidget, rubbing his fingers back and forth.

Exhibit 7 (Affidavit of Geneva Parker).

b. Mr. Mathis' limitations in practical living skills.

The representative skills in the **practical** domain include activities of daily living (eating, transfer/mobility, toileting, dressing), instrumental

activities of daily living (meal preparation, housekeeping, transportation, taking medication, money management, telephone use), occupational skills, and maintaining safe environments. The comparable skills areas in the APA manual are self-care, home living, use of community resources, health, leisure, work, and safety. Mr. Mathis displayed marked deficits in several of these categories.

i. Inappropriate dress

Mr. Mathis dressed oddly, piling on multiple layers of pants, shirts, underwear, and socks. His shirts were often buttoned askew, and the clothes he selected were often wrong for the season. His aunts recall his odd dress:

> Milton would wear double clothes. When he would get dressed, he would put on double pants, double shirts, sometimes he would wear three. It would be hot outside, and he would have on long-sleeve shirts. Sometime he would wear double socks. He would go into to get dressed and he would just keep putting clothes on. If you asked him, "Milton, why you got on so many clothes, you think you're going to be cold?" He wouldn't know. It was like he would get dressed and put too many clothes on and he didn't know why. He would put on his shirt backwards, or with button-down shirts he would button them wrong, and if you said to him, "Milton, your shirt is buttoned wrong," he would say it wasn't. He would double-clothes even when he was older, 13, 14 years old, but his mom, Lucille, would get on him and make him take off some of his clothes.

Exhibit 8 (Affidavit of Ruby Faye Mathis).

His Aunt Mable similarly recalled:

> As far as dressing and taking care of himself, Milton didn't know when it was hot or when it was cold, when it was winter and when it was summer. You would see him wear a coat when it was hot, or long sleeves, he didn't seem to know.

Exhibit 6 (Affidavit of Mable Smith).

Geneva Parker, a close family friend, described it as follows:

> Milton is just different from other kids his age, and other kids could tell he was different and they teased him a lot. They teased him because he looked different. When Milton was a teenager he had this habit of wearing layers of clothes, and so he could have T-shirts and extra shirts and extra shorts sticking out all over the place, and his shirts would be buttoned crooked, so kids teased him about that.

Exhibit 7 (Affidavit of Geneva Parker); S.H. 4:38-39.

His mother noted that:

> Once he started to dress himself, he would dress with many layers which was odd. He would put lots of layers on regardless of the season.

S.H. 3:53.

His mother also found that as a child, Mr. Mathis would continually wear the same clothes,

even after he had soiled them:

> He wore the hat and boots everyday – as long as he could wear them. It was difficult to get him not to wear those clothes. When you would get it off him, he would go back and put it on again, even after he had urinated in them.

S.H. 3:48.

George Moseley, a close friend of Mr. Mathis was equally aware of his peculiar dressing habits:

> He dressed unusually; he would wear the same flannel jacket everyday. He wore it in the summertime and we used to tease him over it.

S.H. 3:140.

ii. ***Poor hygiene and toileting skills***

Poor hygiene and late toileting skills are also indicators of impaired cognitive skills. Mr. Mathis displayed deficits in both areas. His mother described the following age-inappropriate behavior.

> Milton didn't stop sucking his thumb, even when he was in his late teens. As a teenager, I had trouble getting him to bathe properly. He would go into the bathroom and run the water, but he wouldn't really clean himself or use soap. My friend Geneva used to always call him Pissy Little Milton, all his life she called him that, she probably still does.

Exhibit 5 (Affidavit of Lucille Taylor).

Geneva Parker described similar habits:

> Milton was a stinky kid, and he was like that well into his teen-age years. I called him Pissy Milton, because that's how he smelled. You could smell it a mile away. Even as an older boy and young teen-ager, he was wearing a couple of pairs of underwear and I think he was doing that because he wasn't always making it to the bathroom.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4:47.

His Aunt Ruby Faye recalled similar delays in toileting and hygiene skills:

> It took a long time for Milton to be potty-trained, then even as a boy he would wet himself. Sometimes he'd be running to the bathroom and he was already wet. Then you had to get on him to change and wash up, otherwise he would just walk around wet.

Exhibit 8 (Affidavit of Ruby Faye Mathis).

Mr. Mathis' Aunt Mable described poor hygiene as well:

> He also was not good at keeping himself clean. He didn't bathe often enough, and when he did he would half clean himself.

Exhibit 6 (Affidavit of Mable Smith).

Mr. Mathis' high school girlfriend recalls that "he did smell sometimes but I was too embarrassed to say anything". S.H. 4:97. George Moseley also remembered that Mr. Mathis was "dirty. He used to smell of pee when he was 17 years old". S.H. 3:141.

"[T]he pee smell didn't stop when he was 14 or 15, it continued until the time I was working with him at Kiddie Land." S.H. 4:15

iii. ***Difficulty getting around***

Difficulty with transportation is an instrumental activity of daily living cited by the AAMR as an adaptive deficit symptomatic of mental retardation. Milton Mathis had trouble getting around, and family members were accustomed to taking special care to help him. Geneva Parker, who was a close family friend, noticed the care his family frequently took:

> When Milton got older, in his teenage years, he had jobs off and on a lot, and his mother would lead him around. It was like she realized he needed the extra help, even though she wouldn't admit it. She would take him to and from work, and she would go with him to cash his check, and she would buy him stuff or count out the money he needed for stuff so he wouldn't get beat out of his money too often. I remember one time Milton coming home from the wrong direction from school. I think he was lost, but it was a long way from school to home, and they moved a lot. Usually his brother, Tyrone, would be with him and make sure than [sic] Milton got home all right. I don't remember Milton ever taking the bus, him [sic] mom led him around.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4: 53.

Aunt Ruby described Milton's difficulty getting around as well:

> With most kids, if they went to see a friend or something, they could find their way home. With Milton, someone would usually have to go pick him up because he would get lost. Milton was forgetful too. If I would tell him, for example, the name of the market near my house, King's Market, he would forget, and you would have to tell him over and over.

Exhibit 8 (Affidavit of Ruby Faye Mathis).

Patience Smith recalls similar problems with Mr. Mathis catching the bus to see her, this happening when Mr. Mathis was 17 years old. Ms. Smith says that Mr. Mathis missed the bus and got lost repeatedly.

> The next time I asked him to catch the bus, I was more specific and gave him instructions on asking the driver to drop him off...this time he still didn't make it yet he called me and we worked out that he had go ton the wrong bus on the wrong side of the road.

S.H. 4:72.

As a result of Mr. Mathis' inability to travel by bus, Ms. Smith and Mr. Mathis relied on friends to give them rides.

William Bryant recalls Mr. Mathis' difficulties using public transportation:

> ...he would come over to mine to catch the bus. He couldn't stick his money in the slot because he tried to put it in the wrong one. He would then just get agitated about it and I would end

up doing it for him.

S.H. 5:26.

iv. *Occupational Skills*

Mr. Mathis also was unable to perform effectively at work, another indication of mental retardation. Patience Smith recalled the difficulty he had in filling out an application form:

> ...Mathis filled out his part but when it came to the bit related to his past, he asked lots of questions. I got tired of answering his questions and so I filled it out myself. The questions were not hard.

S.H. 4:80.

Mr. Mathis' problems with basic money handling skills led Ms. Smith to constantly accompany Mr. Mathis at work in order to help him. As a result, the managers at the Astrodome where they worked gave them both a verbal warning. S.H. 4:83. William Bryant also identified problems with Mr. Mathis' work ability. At one point, Mr. Bryant worked at "Kiddie Wonderland" with Mr. Mathis. Mr. Bryant worked with the horses and Mr. Mathis's job was with the automated rides. Mr. Bryant remembers:

> On the Ferris Wheel, he had to load people according to weight. He did not always do this and just put people on the ride as they arrived. This caused the ride to not run properly.

S.H. 5:22.

Mr. Bryant testified that "they [the managers of the park] would move him within the park to jobs that were easier". S.H. 5:23. When Mr. Mathis would

help Mr. Bryant with the horses, he caused safety concerns:

> You were meant to keep the ponies and horses separate otherwise it could become dangerous. At times he would put them together.

S.H. 5:24.

c. **Mr. Mathis' Limitations In Social Skills.**

The representative skills in the **social** domain include interpersonal skills, responsibility, self-esteem, gullibility, naivete, following rules, obeying laws, and avoiding victimization. AAMR 2002, at 82. The comparable skill area in the APA manual is "social/interpersonal skills."

i. ***Gullibility***

Mr. Mathis was often teased for being different, and it was easy for other kids to trick him. For example, Mr. Milton would be dared into forbidden behavior by other kids, then get into trouble for it:

> [Kids] used to tell him, for example, I bet you can't get that object (it could be anything: a ball or flowerpot) out of the neighbor's yard. And he would go, and he would come back all happy, and then the kids would tell on him for taking stuff that didn't belong to him.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4:51.

Extensive witness testimony from those close to Mr. Mathis supports the notion that he was unusually gullible. George Moseley remembers:

> I did not think Milton was a smart guy be-

> cause of the things we used to get Milton to do. We would get him to do stuff we wouldn't. For example, if we were trying to steal a dog. and I had seen the dog was aggressive, I would send him to the back and he would steal the dog whatever. I feel bad now for using him like that.

S.H. 3:130

Mr. Mathis was also easily led by others. As mentioned, the other kids made him do things they did not themselves want to do. When George Moseley and Mr. Mathis were stealing dogs in partnership, Mr. Mathis only received about $20 from the $150-200 total amount receive for a pit bull. S.H. 3:131, 132. He did not take issue with getting paid so little, despite performing a more dominant role in the theft: Mr. Mathis being sent "into the backyards and steal the dogs". S.H. 2:155. Mr. Mathis was also frequently "set up" by friends. For example, during an armed robbery Mr. Mathis was given the gun because the others knew that the person with the gun could get in more trouble. S.H. 3:166-168.

ii. Other children knew Milton Mathis was different.

Both as a teenager, and a child, Mr. Mathis was ostracized at times for being slow, for not understanding concepts and games, and for being "dumb." Mr. Mathis was acutely sensitive to this kind of criticism. Geneva Parker recalled Mr. Mathis' inability to join in activities with children, and his sensitivity to being teased:

> He was also a loner – like he would watch other kids playing a game or something, but

> he wouldn't join it, it was like he couldn't understand the way the game was played. Kids teased Milton for being dumb or stupid, and that really upset Milton badly. I caught one of my boys calling him dumb, and I told my boy not to ever call him that again.
>
> When Milton was a teen-ager, he seemed more behind than ever. He played child-like games and seemed kid-like. He was still sucking his thumb, I don't think he ever outgrew that. He was fascinated with puppies and stuff my boys weren't interested in when they were teens. He couldn't take very well, you'd ask him something, like why we wasn't playing with the other kids, and he shrug and kind of slur the words, I-dunno, and you couldn't get him to talk and express himself. He would stand and fidget, rubbing his fingers back and forth.

Exhibit 7 (Affidavit of Geneva Parker).

Mr. Mathis' Aunt Ruby Faye remembered similar incidents:

> You could see that Milton was slow because it would take a long time for him to put things together. Whatever he was doing, it would take longer. Like if he had blocks in front of him, it would take longer for him to put them together. Some of the kids would laugh at him because he was slow, and that would just make him freeze up. I would tell the other kids to leave him alone.

Exhibit 8 (Affidavit of Ruby Faye).

William Bryant, who first met Mr. Mathis be-

tween 10 and 15, says that, "Everybody used to treat Milton as an outsider. They used to say that he was retarded..." S.H. 5:27.

iii. ***Mr. Mathis was Perceived by Adults as Retarded***

It was clear to many of the adults who were in regular contact with Mr. Mathis that he was not normal and that he was likely retarded. Several remember discussing the problem, worrying that Mr. Mathis would not be capable of taking care of himself as an adult, and pointing out the problems to Mr. Mathis' mother, who had difficulty admitting the severity of the problem:

> I remember talking to my friends about Milton and saying, "that boy is retarded." But I wouldn't say that around him or his brothers. They would take up for him. And Milton would get teased for being dumb or being retarded, and that would make him cry. He would cry because he wanted to be smart like the other kids, and I would tell him he was smart, just like all the other children.
>
> Milton was different than the rest of his brothers, and different from most kids. He was very slow. I would talk about it with my sisters sometimes. We used to say to ourselves that this is a boy who will need help throughout his life, that he might not be able to live on his own.

Exhibit 5 (Affidavit of Lucille Taylor).

Mr. Mathis' Aunt Mable also tried to address the problem:

> I used to tell Lucille that she needed to get him checked out, and she would say that there was nothing wrong with him. To avoid an argument, I would just leave it alone. I talked about it with my sisters, we thought he had a problem, that he needed help. But it's hard to see if it's your own kids. Me and my sisters thought Milton was retarded.

Exhibit 6 (Affidavit of Mable Smith).

Geneva Parker tried to encourage Mr. Mathis' mother to get apply for governmental aid:

> Milton Mathis is a boy who always had a hard time. He has had problems all of his life, but his problems seemed to get worse in his teenage years. I used to tell his mother, Lucille, that she could get a check from the government for that boy, because he was really slow. His Momma was in denial, sometimes she would laugh, or sometimes she would get mad and tell me that there was nothing wrong with her son.

Exhibit 7 (Affidavit of Geneva Parker); *see also* S.H. 4:52.

Lucille Taylor, Mr. Mathis' mother, remembers people pointing out the problem, encouraging her to seek help, but not being able to listen:

> It was hard for me to see, but people who were around Milton a lot, like my mother, and my sisters, and my close friend Geneva Parker, used to tell me all the time that Milton had a

> problem, that they thought he was retarded, that he was too slow, that I should be getting disability benefits for that boy. My mom used to say, "I think that boy is retarded, I think there's something wrong with him," but I really didn't listen. As a mother, it was hard for me to see it. I used to get mad, and say that there was nothing wrong with my son.

Exhibit 5 (Affidavit of Lucille Taylor).

3. Mr. Mathis's Mental Retardation Was Evident Prior to Age 18.

The third clinical criterion requires that the condition have manifested itself during the person's developmental period, defined as prior to age 18. Mr. Mathis has demonstrated that his significant limitations manifested themselves before the age of eighteen.

PRAYER FOR RELIEF

WHEREFORE, Mr. Mathis prays that this Court;

1. Issue a writ of habeas corpus to have him brought before it, to the end that he may be relieved of his unconstitutional sentence of death;

2. Grant such other relief as law and justice require.

Respectfully submitted,

By: s/ Morris H Moon

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2007, a copy of this Petition For Writ of Habeas Corpus and accompanying Exhibits were served on the Respondent via U.S. Mail at the following address:

Ms. Laura Berins
Office of the Attorney General
Post Conviction Litigation Division
300 West 15th Street, St. 800
Austin, Texas 78711

s/ Morris H. Moon

Morris H. Moon

VERIFICATION

I, Morris H. Moon state that to the best of my knowledge and belief, the facts sets for in this Petition are true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2007.

s/ Morris H. Moon

Morris H. Moon

APPENDIX K

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN, TEXAS

Cause No. 31,361-C

IN THE 268TH DISTRICT COURT OF FORT BEND COUNTY, TEXAS

Ex parte MILTON WUZAEL MATHIS)
)
APPLICANT)
)

THIRD APPLICATION FOR WRIT OF HABEAS CORPUS BASED ON LEGAL GROUNDS NOT AVAILABLE WHEN THE FIRST APPLICATION WAS FILED

Milton Wuzael Mathis, through undersigned counsel, asks this Court to issue a writ of habeas corpus and grant him relief from his unconstitutional conviction and sentence of death on the grounds that he is mentally retarded and his execution would violate *Atkins v. Virginia*, 536 U.S. 304 (2002), Due Process and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This application is based on legal grounds not available at the time Mr. Mathis' original application was filed. Mr. Mathis' *Atkins* claim was raised in his second

application which the Court of Criminal Appeals dismissed without prejudice due to a pending federal habeas proceedings. The application meets the requirements for a subsequent application under Section 5, Article 11.071, Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

Mr. Milton was tried by a jury and convicted of capital murder in the 268th District Court of Fort Bend County, Texas. Clerk's Record Vol 2, 202. The jury then returned answers to special issues submitted under TEX. CODE CRIM. PROC. Art. 37.071 which required imposition of the death penalty. Clerk's Record Vol 2, 219-20. On September 21, 1999, the trial court entered the judgment and sentence of death. Exhibit 13.

On February 13, 2002, the Court of Criminal Appeals affirmed the conviction and death sentence in *Mathis v. State*, 67 S.W.3d 918 (Tex.Crim.App. 2002).

Mr. Mathis filed his first application for writ of habeas corpus on February 6, 2001. That application did not include the grounds presented in this application. The trial court entered findings of fact and conclusions of law, recommending denial of relief, and the Court of Criminal Appeals denied relief on April 3, 2002.

Undersigned counsel Stephen Doggett and Winston Cochran were appointed by the federal district court to represent Mr. Mathis in federal habeas corpus proceedings. Order Granting Motion for Appointment of Counsel, *Mathis v. Dretke*, No. 03-cv-01138 (S.D. Tx. 4/29/02). On April 3, 2003, Mr.

Mathis filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas. *Id.* On June 20, 2003, while the federal proceeding was pending, Mr. Mathis filed a second state application for writ of habeas corpus in the trial court and the Court of Criminal Appeals raising an *Atkins* claim.[1] Shortly thereafter, the Court of Criminal Appeals ordered briefing in another subsequent habeas case proceeding, *Ex parte Soffar*, WR-29,980-02, on whether the two forum rule, also known as the *Powers* doctrine, should be modified to permit consideration of the merits of a subsequent writ if the federal court stayed its parallel proceedings. On February 11, 2004, the Court of Criminal Appeals modified its two forum rule to permit consideration of a subsequent application provided the federal court stayed all proceedings related to the same case or same matter. *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004). On March 3, 2004, the Court of Criminal Appeals dismissed Mr. Mathis' *Atkins* application under *Soffar* because he had not shown that the federal court had stayed its proceedings.

On February 2, 2004, before the *Soffar* decision, the federal district court denied Mr. Mathis' federal habeas petition. After the *Soffar* decision and before the state application was dismissed, Mr. Mathis filed in the federal court a motion for new trial and a motion for abatement of the federal pro-

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[1] Under the "two-forum rule" in effect at that time, the Court of Criminal Appeals was required to dismiss a successive habeas application if a proceeding related to the same case or matter was pending in a federal court. *See Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972).

ceedings pending the completion of the state court successor application based on *Atkins*. *Mathis v. Dretke*, 03-cv-01138 (S.D. Tex.) (Docket Entry #19, filed February 17, 2004). On March 11, 2004, the federal district court denied the motion for abatement based on a misreading of *Soffar* and the erroneous conclusion that Texas law no longer precluded consideration of a subsequent application during the pendency of federal proceedings related to the same case or matter. *Id.* at Docket Entry #20.

Mr. Mathis appealed the federal district court's decision. While the appeal was pending, the trial judge scheduled Mr. Mathis' execution for April 20, 2005. Mr. Mathis filed a motion for stay of execution in the Fifth Circuit and also asked the federal court to stay the appellate proceedings so that he could pursue his *Atkins* claim in state court. On March 11, 2005, the Fifth Circuit refused to stay the proceedings and denied the appeal. *Mathis v. Dretke*, No. 04-70015 (5th Cir. Mar. 11, 2005). Rehearing was denied on April 8, 2005.

THE SUBSEQUENT APPLICATION REQUIREMENTS

Texas law authorizes the filing of a successive habeas application when the claim or claims raised in the successive petition "have not been and could not have been presented previously ... because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." TEX. CODE CRIM. PROC. Art. 11.071 § 5(a)(1). For purposes of § 5(a)(1), a claim was unavailable "if it was not recognized by or could not have been rea-

sonably formulated from a final decision of the United States Supreme Court...." *Id.* at § 5(d).[2]

Mr. Mathis' original state habeas petition was filed on April, 1997, and denied on April 3, 2002. *Ex parte Mathis*, WR-50,772-01. The Supreme Court decided *Atkins* on June 20, 2002, overruling in parts its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ["*Penry I*"], and announcing a new rule of constitutional law. *Atkins* is retroactive to cases on collateral review. *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002). Consequently, the present Application satisfies the legal requirements for successive petitions. Mr. Mathis requests that the Court of Criminal Appeals authorize its filing so that a writ of habeas corpus shall issue. TEX. CODE CRIM. PROC. Art. 11.071 § 6(b).

CLAIMS FOR RELIEF

CLAIM I: MR. MATHIS' EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST EXECUTION THE MENTALLY RETARDED.

[2] As the Supreme Court has aptly observed, when "a decision of this Court ... explicitly overrule[s] one of our precedents," and that decision "is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted." *Reed v. Ross*, 468 U.S. 1, 17 (1984). In *Penry I*, the Supreme Court considered the retroactivity of a "new rule" prohibiting the execution of mentally retarded persons and held that "such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review." 492 U.S. at 329.

A. The Eighth Amendment prohibits the execution of the mentally retarded.

On June 20, 2002, the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals with mental retardation. Reversing its prior decision in *Penry I*, the Court concluded that "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (internal quotation marks omitted). The Supreme Court rested its conclusion on two grounds.

First, the Supreme Court found persuasive that, at the time of *Penry I* in 1989, only two death penalty states and the federal government had banned the execution of mentally retarded offenders. *Id.* at 314. However, since that time, an additional sixteen states had prohibited the use of the death penalty for the mentally retarded. The Supreme Court noted that it "is not so much the number of States that is significant, but the consistency of the direction of change." *Id.* at 315. These enactments, "[g]iven the well-known popularity of anticrime legislation," provided the Supreme Court with "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* In its search for a national consensus, the Supreme Court relied upon the fact that the legislatures passing the laws voted "overwhelmingly in favor of the prohibition." *Id.* The Supreme Court also looked to the opinions of social and professional organizations with "germane expertise,"

such as the American Psychological Association, and the opposition to the practice by "widely diverse religious organizations," international practice, and polling data. *Id.* at 316 n.21. While "not dispositive," these factors bolstered the Supreme Court's opinion that a consensus opposing the practice existed "among those that have addressed the issue." *Id.* Finally, the Supreme Court noted that even in those states that retained the death penalty for the mentally retarded, only five had actually carried out the execution of a mentally retarded individual since *Penry I*. *Id.* at 316. Because the practice had become "truly unusual," it was "fair to say," according to the Supreme Court, that "a national consensus has developed against it." *Id.*

The second reason the Supreme Court advanced for banning the execution of the mentally retarded was that "this consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." *Id.* at 317. The Supreme Court noted that, due to their impairments, defendants with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others." *Id.* These deficiencies, the Supreme Court held, while not justifying an exemption from criminal liability, do diminish a mentally retarded person's personal culpability to the extent that neither of the justifications advanced by states in support of the death pen-

alty - retribution and deterrence – would be served by permitting a retarded person's execution. *Id.*

Retribution in the capital context had been limited to ensuring that "only the most deserving of execution are put to death." *Id.* at 319. Because the "just deserts" rationale necessarily depends on the culpability of the offender, the most extreme punishment was deemed excessive due to the "lesser culpability of the mentally retarded offender." *Id.* And, because capital punishment can serve as a deterrent only when a crime is the result of premeditation and deliberation, no deterrence interests are served. *Id.* This type of calculus, the Supreme Court noted, is at the "opposite end of the spectrum" from the behavior of the mentally retarded because of their cognitive and behavioral impairments. *Id.*

The Supreme Court also opined that, due to the impairments of mentally retarded individuals, a host of factors – from the increased risk of false confessions, difficulties in communicating with counsel, and their lesser ability due to limited communication skill to effectively testify on their own behalf or express remorse – created, "in the aggregate," an unacceptable "risk of wrongful executions" for mentally retarded defendants. *Id.* at 321. In short, the Supreme Court held that its "independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislatures that have ... concluded that death is not a suitable punishment for a mentally retarded criminal," and thus the Constitution "places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* (internal quotation marks omitted).

B. Definition of mental retardation under *Atkins*.

The American Association on Mental Retardation ("AAMR") defines mental retardation as: (1) subaverage general intellectual functioning (*i.e.*, an IQ of approximately 70 to 75 or below) that exists concurrently with (2) related limitations in two or more adaptive skill areas (communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work), and (3) onset before the age of eighteen. American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereinafter "1992 AAMR Manual"]. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") employs a definition that is nearly identical to the one set out in the 1992 AAMR Manual.[3] In the two decisions that address the constitutionality of executing persons who are mentally retarded, the Supreme Court expressly

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[3] The DSM-IV-TR defines mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000) ("DSM-IV-TR"); *see Atkins*, 122 S. Ct. at 2245 n.3 (setting out American Psychiatric Association's definition with approval).

relied on these three-prong definitions. *See Atkins*, 536 U.S. at 309 N.3; *Penry I*, 492 U.S. at 307-09 n.1. In late May 2002, the AAMR released the latest version of its manual. American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002) [hereinafter "2002 AAMR Manual"]. The three diagnostic criteria are essentially the same as in the earlier version, but the new manual places a greater emphasis on adaptive behavior deficits and describes those deficits in a different way that is more easily understood and applied.

C. Mr. Mathis is mentally retarded.

Credible evidence demonstrates that Mr. Mathis is mentally retarded: (1) his IQ is below 70 placing him within the range for the mentally retarded; (2) he has significant limitations in his adaptive functioning; and, (3) the clear weight of the evidence shows that these diagnostic features existed before the age of eighteen.

1. Mr. Mathis' IQ is within the range of the mentally retarded.

According to testing administered by the medical division of the Texas Department of Criminal Justice (TDCJ) in 2002, Mr. Mathis has a full scale IQ of 62 – clearly within the mildly mentally retarded range of intellectual functioning. Exhibit 1. Although this test was administered when Mr. Mathis was 22, there is no basis for concluding that Mr. Mathis IQ dropped to within the mentally retarded range between the ages of 18 and 22. To the contrary, Mr. Mathis social and educational history

demonstrate that the onset of Mr. Mathis' subnormal intellectual functioning, as well as his substantial adaptive behavior deficits, occurred before the age of 18. Exhibit 1 (prison records accompanying results if 2002 IQ testing noting "his current cognitive functioning appears to be a function of drug use ...").

The testing administered by TDCJ in 2002 appears to have been a short form of the WAIS-R. It is expected that a mental retardation expert would recommend additional testing in order to confirm the 2002 results. Since Mr. Mathis is indigent and without sufficient funds, he has not been able to obtain a current evaluation by a mental health expert.

The assistance of appropriate mental health experts are absolutely essential to a full and fair presentation of Mr. Mathis' *Atkins* claim. Experts are necessary to explore fully the impact of Mr. Mathis' long abuse of drugs on his intellectual capacity and functioning before the age of 18 as well as to evaluate and explain the inaccuracy of the 1991 IQ testing. Accordingly, a stay should be granted, counsel appointed, experts provided and a hearing conducted.

2. The onset of Mr. Mathis' subnormal IQ was before the age of 18.

Mr. Mathis has suffered from mental, emotional, and education disability throughout his life. He was held back in the first grade, and he continued to have academic as well as disciplinary problems throughout his education until he dropped out of school while repeating the 9th grade. Exhibits 2, 3, 4, 5, 6, 7 and 8. During elementary school he was placed in resource classes, and was often "placed" in

the next grade through his academic performance did not qualify him for promotion. Exhibits 2, 7, and 8. IN the 7th, 8th and 9th grades, Mr. Mathis made D's and F's. During his second year in the 9th grade he continued to make D's and F's and dropped out of school. Exhibits 2 and 4.

The adults around Mr. Mathis during his childhood were cognizant of the trouble Milton Mathis was having in school. Mr. Mathis was had perennial trouble reading, writing, and doing simple math. Other children regularly out-performed him, doing homework faster and grasping homework concepts at a much younger age. Exhibits 7, 9. Children in his life often made fun of him for being dumb, stupid, or retarded. Exhibits 7, 8, 9, 10. Adults in his life realized that he was so slow that it was a problem, that he was likely retarded, that he "was a boy who [would] need help throughout his life," and that "he might not be able to live on his own." Exhibits 10, 7, 8 and 9. Mr. Mathis had difficulty with everyday activities: dressing himself properly, keeping himself clean, cooking, getting places on his own, managing (and even counting) money, and remembering simple tasks. As he got older, his behavior was often age-inappropriate, and he had difficulty expressing himself. Exhibits 7, 8.

In 1991, when Mr. Mathis was in the 5th grade and almost twelve years old, he was referred for an evaluation because of "poor school performance." Exhibit 11. The school administered a WISC-R and a number of other tests. The WISC-R results showed a full scale IQ of 79, which placed Mr. Mathis in the range of "borderline intellectual functioning." WISC-R Manual; DSM-VI-TR, V62.89. Although this ap-

pears to conflict with the results of the TDCJ-ID testing in 2002, a closer look reveals that the 1991 test cannot be relied on as an accurate measure of Mr. Mathis' IQ and that it significantly inflated his actual IQ score which was more likely in the mildly mentally retarded range.

The 1991 report that Mr. Mathis full scale IQ was 79 was based on an outdated WISC-R test which was normed in 1974, and thus it cannot be considered an accurate measure of Mr. Mathis' true level of intellectual functioning at that time. The WISC-R was 17 years "outdated" and had been replaced by the WISC-III that same year. Kanaya et al., *The Flynn Effect and U.S. Policies*, AMERICAN PSYCHOLOGIST, Oct. 2003, at 1, 10 (attached as Exhibit 12). It is well-documented that the use of outdated tests artificially inflates IQ scores. This accepted phenomenon is referred to as the "Flynn Effect." *Id.* at 1. According to well-documented studies, because Mr. Mathis was given the WISC-R and not the WISC-III, his Full Scale IQ score was inflated by 5 to 9 points. *Id.*

A 2003 study found that, among children who scored between 55 and 85 on the WISC-R and were subsequently retested with the WISC-III, the mean decline in Full Scale IQ score was 5.6 points. *Id.* 10. Among the children who scored between 71 and 85 on the WISC-R, the number of children who were subsequently classified as mentally retarded after resting with the WISC-III ***doubled***. *Id.* at 7. Retesting with the "newer, harder WISC-III norms posed a ***significantly greater likelihood of MR classification*** for those originally tested with older WISC-R norms." *Id.* (emphasis added). The 2003 study concluded that the Flynn Effect between the WISC-R

WISC-R and the WISC-III falls between 5 and 6 points for children in the borderline ranges (71-85). *Id.*

"In a study reported in the WISC-III manual, the mean WISC-R Full Scale IQ in a sample of MR children was 8.9 points greater than the mean WISC-III Full Scale IQ." *Id.* at 3. As the authors note, "[t]his general finding within MR samples has been replicated by other researchers, although the exact difference in the Full Scale IQ scores between the WISC-R and the WISC-III varies between 5 and 9 points." *Id.* Taking the Flynn effect into account, the WISC-R results should be adjusted to reflect a full IQ score of between 70 and 74.

In addition to the Flynn effect, the standard error of measurement for IQ tests is plus or minus 5 points. Mr. Mathis' history of significant adaptive deficits and poor intellectual performance (see below) strongly suggests that the test inflated rather than deflated the level of his actual intellectual functioning. After accounting for the Flynn Effect from the use of an outdated IQ test and the standard error of measurement, Mr. Mathis' IQ was likely between 65 and 69. Thus, even before Mr. Mathis began a six-year chemical assault on the brain, starting at age 13, it is more likely that Mr. Mathis' true level of intellectual functioning was in the mildly mentally retarded range.

Finally, as described below, it is highly probably that between the ages of 13 and 18 Mr. Mathis suffered significant and permanent brain damage from his heavy abuse of mind altering and brain damaging drugs, further impairing his intellectual functioning. This is consistent with, and confirmed

by, the IQ testing performed by the State in this case which measured Mr. Mathis' Full Scale IQ at 62. *See* Exhibit 1.

3. Brain damage and further impairment of Mr. Mathis intellectual functioning occurred between the ages of 13 and 18 as a result of heavy use of brain damaging drugs.

It is almost certain that between the ages of 13 and 18, Mr. Mathis suffered significant and permanent brain damage from his heavy abuse of brain damaging drugs. As revealed by the 2002 testing, which reported an IQ of 62, this brain damage further impaired his intellectual functioning.

a. Mr. Mathis consistently abused marijuana soaked in formaldehyde and other damaging drugs.

Mr. Mathis began abusing drugs at 13 or 14 years of age while in the 6th grade. Mr. Mathis' drug use was constant and consisted of abuse of PCP, codeine and marijuana cigarettes soaked in formaldehyde, also known as "wet," "water," or "fry." *See e.g.* Exhibit 1 (according to the TDCJ correctional psychologist, Gilhousen, Mr. Mathis "admitted to heavy use of drugs such as PCP, "water" which is formaldehyde soaked marijuana cigarettes, alcohol, and codeine laced cough syrup."). Mr. Mathis reportedly smoked approximately 30 formaldehyde-soaked cigarettes a week beginning in sixth grade. As he grew older, the frequency of his smoking increased, and he would either skip school to get high or smoke fry before class each day. This formaldehyde and/or PCP

use continued for about six years at an almost constant rate of 6-7 fry cigarettes per day. Dr. Jesse Reed, an expert who testified at trial, confirmed the length of time Mr. Mathis used fry and averred that fry is "a pretty frightening drug if you think about it." S.F. Vol 43:62.

B. Mr. Mathis' use of "fry" caused permanent brain damage which would have lowered his IQ score before the age of 18.

A review of the literature discussing use of formaldehyde-soaked marijuana demonstrates that Mr. Mathis' use of the substance almost certainly reduced his IQ. In a 1998 study conducted on behalf of the Texas Commission on Alcohol and Drug Abuse, Dr. William Elwood discovered that most Houston adolescents who believed they were smoking marijuana dipped in embalming fluid were also exposed to PCP which was an added component of the "embalming fluid." Exhibit 14 at 4-6. The long term effects, according to the report, include "stop[ping] the maturation process" and brain damage: two effects consistent with the mental impairment aspect of mental retardation.

Anecdotal evidence collected by Dr. Elwood reaffirms this assertion, noting that some adolescents recognized the substance caused brain damage and several others knew friends who were in mental health/mental retardation facilities from excessive use of fry. *Id.* at 12. As the study makes clear, other states, such as Connecticut, have begun campaigns to warn youth of the dangers of fry, known on the East Coast as "Illy." According to the Connecticut

Department of Public Health, for example, "Illy" contains embalming chemicals that, amongst other things, cause headaches, body tissue deterioration, and ***permanent brain damage***. *Id.* at 23.

A recently-published study by Dr. Ronald Peters and others, reaffirms the earlier work of Dr. Elwood. In a pilot study about why youth use fry, Dr. Peters notes that "[t]he effects from exposure to the predominant components of fry – formaldehyde and ethyl alcohol or ethanol – include bronchitis; body tissue destruction; [and] brain damage ..." Exhibit 15 at 564.

The mentally damaging effects of fry and similar drugs have also been noted in non-academic literature. *The Houston Chronicle* has run several articles describing the damage caused by the substance. In a 1986 article, Alex Appiah, a Dallas-area drug counselor, described users of PCP-dipped marijuana cigarettes as "zombies" and noted that "[m]ost of the people we've seen seem to have a permanent brain dysfunction." Exhibit 16. A HPD narcotics officer, Lew Deanda, told the Chronicle later that year that a marijuana cigarette laced with embalming fluid is "quite toxic." Exhibit 17. According to Deanda, "[i]t kills your brain cells, which do not regenerate. You lose function of whatever those cells do." *Id.* In a 1992 article, John Gatlin of Odyssey House, a juvenile drug rehabilitation clinic, told the Chronicle that "[t]he capacity for organic damage is very high" with fry usage and likened the damage to that of inhalant use. Exhibit 18.

Perhaps the most germane studies were those conducted by Dr. Raymond Singer and reproduced in the *Neurotoxicity Guidebook*, 1990. Exhibit 19 (Ex-

cerpts of *Neurotoxicity Guidebook*). Dr. Singer presents several cases of formaldehyde exposure leading to neurological damage.[4] In the first case study, a woman was exposed to formaldehyde foam insulation for a period of three years and began to experience fatigue, sore throat, dry nose and aches. Exhibit 19 at 132. After an allergist determined that her symptoms "were caused and aggravated by exposure to urea-formaldehyde insulation," the woman underwent a full battery of neuropsychological testing. *Id.* at 34. Among other concerns, Dr. Singer noted a substantial decline in IQ. Whereas the subject had previously been in the very superior range with an IQ average of 135 and a documented high score of 144, after formaldehyde exposure, the woman's IQ declined to a full-scale 125. *Id.* at 136.

Another case study tracked a woman who was also exposed to formaldehyde foam insulation. School transcripts placed her full-scale IQ at 106 in the eighth grade. *Id.* at 144. After a neuro-psychological battery of tests was conducted, the woman's post-exposure full-scale IQ was 93, a decrease of 13 points. *Id.*

In yet another reported case, an 8-year-old boy was exposed to formaldehyde vapors for 2 years. During that period, his "WISC IQ dropped from the 91st to the 70th percentile, with the greatest decrease in performance measures." *Id.* at 171-72 (citing Sauter, D.L. 1981 *The Development and Application of a Battery for the Exploratory Screening for Neuropsy-*

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[4] Because each of the cases Dr. Singer examined were caused by incidental exposure, presumably Mr. Mathis' exposure to formaldehyde was even greater since he was purposefully inhaling it.

chological Deficits in Children Exposed to Formaldehyde).

Mr. Mathis' direct and purposeful use of formaldehyde clearly most certainly resulted in increased brain dysfunction due to the exposure. Like the 8 year-old boy in the study cited by Dr. Singer, Mr. Mathis' IQ dropped dramatically in the years he was smoking fry. Moreover, the greatest decrease was likewise in performance measures. According to the 1991 IQ test, at age 12, Mr. Mathis' performance IQ surpassed his verbal IQ by 8 points. Exhibit 11. After almost 6 years of formaldehyde use, his performance IQ plummeted to 60 and was 5 points lower than his verbal IQ of 60. Exhibit 1.

Although TDCJ Correctional Psychologist Gilhousen surmised that the TDCJ test "is not indicative of mental retardation as onset did not occur before age 18, most likely," Exhibit 11, the literature discussed above and the facts of Mr. Mathis' case demonstrate otherwise. First, it is strongly evident from the extent scientific (and other) literature that "fry" literally and immediately causes permanent, organic brain damage. Mr. Mathis was incarcerated at age 19 and thus had no access to "fry" almost 3 years before the subsequent IQ testing. Indeed, the majority of his formaldehyde usage occurred between the ages of 13 and 18. Comparison of Mr. Mathis' TDCJ testing and his previous IQ scores also indicate a startling similarity to the case studies of persons suffering from the effects of formaldehyde neurotoxicity. Given the circumstances of Mr. Mathis' adolescence it is most probably that his excessive drug usage accounted for his neurological damage and subsequent reduction in IQ, and there

are no circumstances that account for a drop in IQ between the ages of 19 through 22.

4. Mr. Mathis has significant limitations in adaptive behavior.

a. The principles guiding the assessment of adaptive behavior.

Prior to the present edition of the AAMR manual, the AAMR manual (9th ed. 1992) utilized a description of adaptive behavior domains similar to the description of the eleven domains still utilized by the APA. The only difference was that the domain, "social/interpersonal skills," was called "social skills" in the AAMR manual, the domain "use of community resources," was called "community use" in the AAMR manual, and the two domains, "health" and "safety," were combined into a single "health and safety" domain in the AAMR manual. *See* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (9th ed. 1992).

In 2002, AAMR modified its definition of mental retardation to include three-domains of adaptive behavior – conceptual, social, and practical skill. The 2002 definition is the following:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before the age of 18.

AAMR 2002, at 1. The current AAMR manual requires that there be "significant limitations ... in

adaptive behavior as expressed in conceptual, social, and practical skills." AAMR 2002, at 1. "Significance" can be established by the limitations in one of the three domains. AAMR 2002, at 74, 77-78. The AAMR manual provides examples of "representative skills" in each of the three domains. Representative **conceptual skills** are "language, reading and writing, money concepts, and self-direction." *Id.* at 82. Representative **social skills** are "interpersonal, responsibility, self-esteem, gullibility, naivete, follows rules, obeys laws, avoids victimization." *Id.* Representative **practical skills** are "activities of daily living, instrumental activities of daily living, occupational skills, and maintains safe environments." *Id.*

The APA definition requires that there be "significant limitations" in at least two of the following eleven domains:

- Communication
- Self-care
- Home living
- Social/interpersonal skills
- Use of community resources
- Self-direction
- Health
- Safety
- Functional academics
- Leisure
- Work

DSM-IV-TR, at 41.

The following chart demonstrates the relationship of the 1992 and 2002 definitions of adaptive behavior skills:

Relationships of 1992 and 2002 Adaptive Skills

Adaptive Behavior Skill Areas in 2002 Definition	Representative Skills in 2002 Definition	Skill Areas Listed in 1992 Definition
Conceptual	Language Reading and Writing Money Concepts Self-Direction	Communication Functional academics Self-direction Academics
Social	Interpersonal Responsibility Self-esteem Gullibility Naiveté Follows rules Obeys laws Avoid victimization	Social skills Leisure
Practical	Activities of daily living • Eating • Transfer/Mobility • Toileting • Dressing Instrumental activities of daily living • Meal Preparation • Housekeeping • Transportation • Taking Medication • Money management • Telephone Use Occupational skills Maintains safe environments	Self-care Home living Community use Health and safety Work

2002 AAMR Manual, Table 5.2 and 3.1

A person who has mental retardation does not need to demonstrate – and rarely has - deficits in all domains. The AAMR requires deficits in only one of three domains or areas of adaptive behavior skills. The APA requires skills deficits in two of eleven areas. Mr. Mathis' substantial adaptive behavior clearly meet the requirements under the 1992 and current definitions of adaptive behavior skills as well as the APA's definitions.

b. Mr. Mathis' limitations in conceptual skills

The representative skills in the **conceptual** domain include the use of language, reading and writing, money concepts, and self-direction. AAMR 2002, at 82. The comparable skills in the APA manual are communication, self-direction, and functional academics.

i. Lifelong poor academic performance

Mr. Mathis has a lifelong history of poor academic performance. In elementary school, Mr. Mathis flunked his first grade, was placed in resource classes in second or third grade, and flunked the fifth grade but was "placed" in sixth grade because of prior failures and an apparent concern for his age. Exhibits 5, 7, 8. By the time he got to middle school, Mr. Mathis was placed in special education classes starting in the 8th grade. Exhibits 4,. Nevertheless, he flunked the 9th grade, and dropped out of school mid-way through his second year of 9th grade. Exhibit 5.

Adults in Mr. Mathis' life realized that his chronic difficulties in school stemmed from an inability to understand and/or to master simple academic skills such as reading, writing, and math. His mother, who was reluctant to recognize her son's disability, was often told that her son's problems were serious, and tried to help her son learn basic academic skills:

> Milton had a hard time in school. He failed first grade, and he was in resource classes starting in second or third grade. Milton's reading skills were always bad. All through school his handwriting was terrible. I used to try to teach him, but it was hard for him. If he had to write something that was a couple of paragraphs long, he couldn't do it. Even simple math was hard for him. I don't think Milton could count to a hundred.

Other adults in Milton Mathis life similarly observed an inability to perform simple academic tasks that other children, even much younger, mastered quite easily. Milton Mathis' aunt recalled:

> Milton was not as smart as other kids. My daughter was brighter than he was, and she was seven years younger. My daughter could catch on to things a lot faster than Milton could, even simple things, like adding and subtracting and reading and spelling. When they would be doing homework together, my daughter and other kids could get it but Milton couldn't. I would see him try to read sometimes when he was a teenager, and he was like a beginner. He couldn't write or spell simple things like other kids could. He would get very

> frustrated sometimes, throw his homework on the floor, because he was trying but he just couldn't get it. I don't think there's any way Milton could count to a hundred, maybe to twenty without error.

Exhibit 9. A family friend of Milton Mathis' mother recalled similar academic difficulties:

> Milton had a hard time with his homework. I know that he was held back in the first grade and I think several times after that. I also know that his mother would place him in the next grade, even when he wasn't ready to move on. Milton and his brothers used to be at my house a lot, and I would try to help him with his homework, but I just didn't have the patience. It took him so much longer than it took my boys, and he had trouble reading even simple words. When he would read out loud, he would skip words that he didn't' know, and it would all come out not making sense, and he would get frustrated. If you gave Milton a couple of paragraphs to read, he couldn't do it, no way, not even when he was an older teen. I used to try to get him to do better, I told him I would buy him some Jordans that he wanted – tennis shoes that all the kids want – and I would have too. I told him he had to get his grades up, and he really tried. He would show me homework that he did and got back, but I would tell him he had to wait until his report card came out, he had to pass, but he just couldn't do it. My children's daddy, my husband at the time, he had a lot more patience than either me or Lucille, he would sit with

> him and go over everything and spend the time that Milton needed. It took him a lot longer to learn.

Exhibit 1.

ii. Inability to manage or count money

Mr. Mathis' academic deficits affected his ability to manage, and even to count, money. From the time Milton Mathis was a young teenager, he got jobs outside the home. It was through one of these job experiences that Lucille Taylor, Mr. Mathis' mother, first realized that he was unable to count money:

> When Milton was in his teenage years, he got different jobs to try to help out. He worked for a barbeque stand called Jones Barbeque for a guy named Curtis. Curtis is the one who first told me that Milton couldn't count change, and I didn't believe it at first. He said that he had watched him with customers, and he didn't know how much change to give back. Curtis said that he would still let Milton work there, but he couldn't be left alone, and he couldn't deal with the money. So Milton made the sandwiches. After I realized that, I tried to teach him, and he could tell you what a quarter or a dime or a dollar was, but when it came to figuring out how much money to give someone for something, it was hard for him. So I was more careful after that. If he went to get a soda, I counted out the change for him so he wouldn't get beat out of his money. When Milton got paid at work, he would bring me his

> check and say it was for me. I would tell him it was for him, and I would go with him to cash the check. He didn't have a checking account, and couldn't manage money. One of us would go with him a lot of times to buy clothes or whatever it was he wanted. If he was going on his won to buy something, I would have him ask how much it was, then I would give him the right amount of money. When I gave him money from his check, I would tell him how much it was, I would tell him "here's twenty dollars," so he would know what he had and wouldn't get beat out of his money.

Exhibit 8. Geneva Parker, a close family friend, similarly tried to teach Mr. Mathis simple money skills:

> He couldn't count change either. I used to tease him and tell him that he couldn't get an ice cream cone unless he could count out the change, and as soon as you got anything more complicated than two quarters, as soon as you added in dimes and nickels, he couldn't count I tout. And he was 14, 15 years old. I tried to teach him too, but he just couldn't understand it.

Exhibit 7.

iii. Receptive and expressive language deficits

Adults in Mr. Mathis' life uniformly commented on Mr. Mathis' apparent inability to understand direction without repetition. Adults described Mr. Mathis as different from other children in the sense that adults had to repeat directions to him, and most believed that he was not understanding or

remembering what had been said. According to Milton Mathis's mother:

> Milton was forgetful. If I told him to clean his room or take his lunch, he would tell me later he forgot, and I think a lot of the times he did forget. If I sent him somewhere with a message, he would often forget, so I would sometimes give him notes with my messages. He tried to play football, but I think he got kicked off the team for not following directions.

Exhibit 8. Geneva Parker similarly recalled:

> When Milton was 14 or 15 years old, his Momma lived a couple of street over from me. His Momma would send him over with a message for me, and he would get inside and start to tell me, but then he would realize he forgot what he was supposed to tell me. So he would go back to get the message again, and come back, and even then sometimes he would forget. His mom got so she would write me a note, and send it to me in his pockets, and then call me to tell me to remind him to give it to me. We would laugh about his forgetfulness.

Exhibit 7. His aunts recall that he would forget simple things, like the name of the corner store.

Exhibit 10. His maternal aunt Mable recalled:

> Around the house, when Milton had to clean up, he was sloppy. Often if you told him to do something you had to tell him more than one time, you had to repeat and repeat with Milton, and honestly, a lot of the time it seemed like he didn't get it.

Exhibit 9. As to expressive language skills, Milton Mathis was stand-offish and soft-spoken as a teenager:

> He couldn't talk very well, you'd ask him something, like why we wasn't' playing with the other kids, and he shrug and kind of slur the words, I-dunno, and you couldn't get him to talk and express himself. He would stand and fidget, rubbing his fingers back and forth.

Exhibit 7.

c. Mr. Mathis' limitations in practical living skills.

The representative skills in the **practical** domain include activities of daily living (eating, transfer/mobility, toileting, dressing), instrumental activities of daily living (meal preparation, housekeeping, transportation, taking medication, money management, telephone use), occupational skills, and maintaining safe environments. The comparable skills areas in the APA manual self-care, home living, use of community resources, health, leisure, work, and safety. Mr. Mathis displayed marked deficits in several of these categories.

i. Inappropriate dress

Mr. Mathis dressed oddly, piling on multiple layers of pants, shirts, underwear, and socks. His shirts were often buttoned askew, and the clothes he selected were often wrong for the season. His aunts recall his odd dress:

> Milton would wear double clothes. When he would get dressed, he would put on double pants, double shirts, sometimes he would wear

> three. It would be hot outside, and he would have on long-sleeve shirts. Sometime he would wear double socks. He would go into to get dressed and he would just keep putting clothes on. If you asked him, "Milton, why you got on so many clothes, you think you're going to be cold?" He wouldn't know. It was like he would get dressed and put too many clothes on and he didn't know why. He would put on his shirt backwards, or with button –down shirts he would button them wrong, and if you said to him, "Milton, your shirt is buttoned wrong," he would say it wasn't. He would double-clothes even when he was older, 13, 14 years old, but his mom, Lucille, would get on him and make him take off some of his clothes.

Exhibit 10. His aunt Mable similarly recalled:

> As far as dressing and taking care of himself, Milton didn't know when it was hot or when it was cold, when it was winter and when it was summer. You would see him wear a coat when it was hot, or long sleeves, he didn't seem to know.

Exhibit 9. Geneva Parker, his mother's close family friend, described it as follows:

> Milton is just different from other kids his age, and other kids could tell he was different and they teased him a lot. They teased him because he looked different. When Milton was a teenager he had this habit of wearing layers of clothes, and so he would have T-shirts and extra shirts and extra shorts sticking out all over

> the place, and his shirts would be buttoned crooked, so kids teased him about that.

Exhibit 7

ii. Poor hygiene and toileting skills.

Poor hygiene and late toileting skills are indicators of impaired cognitive skills. Mr. Mathis displayed deficits in both areas. His mother described the following age-inappropriate behavior:

> Milton didn't stop sucking his thumb, even when he was in his late teems. As a teenager, I had trouble getting him to bathe properly. He would go into the bathroom and run the water, but he wouldn't really clean himself or use soap. My friend Geneva used to always call him Pissy Little Milton, all his life she called him that, she probably still does.

Exhibit 8. Geneva Parker described similar habits:

> Milton was a stinky kid, and he was like that well into his teen-age years. I called him Pissy Milton, because that's how he smelled. You could smell it a mile away. Even as an older boy and young teen-ager, he was wearing a couple of pairs of underwear and I think he was doing that because he wasn't always making it to the bathroom.

Exhibit 7. His aunt Ruby Faye recalled similar delays in toileting and hygiene skills:

> It took a long time for Milton to be potty-trained, then even as a boy he would wet himself. Sometimes he'd be running to the bathroom and he was already wet. Then you had to

> get on him to change and wash up, otherwise he would just walk around wet.

Exhibit 10. Milton Mathis' aunt Mable described poor hygiene as well:

> He also was not good at keeping himself clean. He didn't bathe often enough, and when he did he would half clean himself.

Exhibit 9.

iii. Poor meal preparation & housekeeping

Cooking is a multi-step process that is often difficult for persons with severe cognitive deficits. Mr. Mathis' mother noticed the difficulty he had putting together a meal, in spite of his eagerness to try:

> When I used to leave my kids alone, I always had to warn them not to cook, but Milton would cook anyway. He would burn things. He would try to make things like pancakes, but he would mess it up. He couldn't measure the ingredients, so he would just put things in that he remembered seeing me put in. He would try to make pancakes with flour and water, or would forget things like eggs. When he made eggs he would ruin them with way too much pepper, too much salt. My kids would tell him it was good, because they didn't want to make him feel bad, but they would tell me it was nasty.

Exhibit 8.

iv. Difficulty getting around

Difficulty with transportation is an instrumental activity of daily living cited by the AAMR as an adaptive deficit symptomatic of mental retardation. Milton Mathis had trouble getting around, and family members were accustomed to taking special care to help him. Geneva Parker, who was a close family friend, noticed the care his family frequently took:

> When Milton got older, in his teenage years, he had jobs off and on a lot, and his mother would lead him around. It was like she realized he needed the extra help, even though she wouldn't admit it. She would take him to and from work, and she would go with him to cash his check, and she would buy him stuff or count out the money he needed for stuff so he wouldn't get beat out of his money too often. I remember one time Milton coming home from the wrong direction from school. I think he was lost, but it was a long way from school to home, and they moved a lot. Usually his brother, Tyrone, would be with him and make sure than [sic] Milton got home all right. I don't remember Milton ever taking the bus, him [sic] mom led him around.

Exhibit 7.

His aunt Ruby described his difficulty getting around as well:

> With most kids, if they went to see a friend or something, they could find their way home. With Milton, someone would usually have to go pick him up because he would get lost. Milton was forgetful too. If I would tell him, for

> example, the name of the market near my house, King's Market, he would forget, and you would have to tell him over and over.

Exhibit 10.

d. Mr. Mathis' limitations in social skills.

The representative skills in the **social** domain include interpersonal skills, responsibility, self-esteem, gullibility, naivete, following rules, obeying laws, and avoiding victimization. AAMR 2002, at 82. The comparable skill area in the APA manual is "social/interpersonal skills."

i. Gullibility

Mr. Mathis was often teased for being different, and it was easy for other kids to trick him. For example, Mr. Milton would be dared into forbidden behavior by other kids, then get into trouble for it:

> [Kids] used to tell him, for example, I bet you can't get that object (it could be anything – a ball or a flowerpot) out of the neighbor's yard. And he would go, and he would come back all happy, and then the kids would tell on him for taking stuff that didn't belong to him.

Exhibit 7.

ii. Other children knew Milton Mathis was different.

Both as a teenager, and a child, Mr. Mathis was ostracized at times for being slow, for not understanding concepts and games, and for being "dumb." Mr. Mathis was acutely sensitive to this kind of criti-

cism. Geneva Parker recalled Mr. Mathis' inability to join in activities with children, and his sensitivity to being teased:

> He was also a loner – like he would watch other kids playing a game or something, but he wouldn't join it, it was like he couldn't understand the way the game was played. Kids teased Milton for being dumb or stupid, and that really upset Milton badly. I caught one of my boys calling him dumb, and I told my boy not to ever call him that again.
>
> When Milton was a teen-ager, he seemed more behind than ever. He played child-like games and seemed kid-like. He was still sucking his thumb, I don't think he ever outgrew that. He was fascinated with puppies and stuff my boys weren't interested in when they were teens. He couldn't talk very well, you'd ask him something, like why we wasn't playing with the other kids, and he shrug and kind of slur the words, I-dunno, and you couldn't get him to talk and express himself. He would stand and fidget, rubbing his fingers back and forth.

Exhibit 7. Mr. Mathis' aunt Ruby Faye remembered similar incidents:

> You could see that Milton was slow because it would take a long time for him to put things together. Whatever he was doing, it would take longer. Like if he had blocks in front of him, it would take longer for him to put them together. Some of the kids would laugh at him because he was slow, and that would just

> make him freeze up. I would tell the other kids to leave him alone.

Exhibit 10.

ii. Perceived by adults as retarded

It was clear to many of the adults who were in regular contact with Mr. Mathis that he was not normal, that he was likely retarded. Several remember discussing the problem, worrying that Mr. Mathis would not be capable of taking care of himself as an adult, and pointing out the problems to Mr. Mathis' mother, who had difficulty admitting the severity of the problem:

> I remember talking to my friends about Milton and saying, "that boy is retarded." But I wouldn't say that around him or his brothers. They would take up for him. And Milton would get teased for being dumb or being retarded, and that would make him cry. He would cry because he wanted to be smart like the other kids, and I would tell him he was smart, just like all the other children.
>
> Milton was different than the rest of his brothers, and different from most kids. He was very slow. I would talk about it with my sisters sometimes. We used to say to ourselves that this is a boy who will need help throughout his life, that he might not be able to live on his own.

Exhibit 10. Mr. Mathis' aunt Mable also tried to address the problem:

> I used to tell Lucille that she needed to get him checked out, and she would say that there was nothing wrong with him. To avoid an argument, I would just leave it alone. I talked about it with my sisters, we thought he had a problem, that he needed help. But it's hard to see if it's your own kids. Me and my sisters thought Milton was retarded.

Exhibit 9. Geneva Parker tried to encourage Mr. Mathis' mother to get apply for governmental aid:

> Milton Mathis is a boy who always had a hard time. He has had problems all of his life, but his problems seemed to get worse in his teenage years. I used to tell his mother, Lucille, that she could get a check from the government for that boy, because he was really slow. His Momma was in denial, sometimes she would laugh, or sometimes she would get mad and tell me that there was nothing wrong with her son.

Exhibit 7. Lucille Taylor, Mr. Mathis' mother, remembers people pointing out the problem, encouraging her to seek help, but not being able to listen:

> It was hard for me to see, but people who were around Milton a lot, like my mother, and my sisters, and my close friend Geneva Parker, used to tell me all the time that Milton had a problem, that they thought he was retarded, that he was too slow, that I should be getting disability benefits for that boy. My mom used to say, "I think that boy is retarded, I think there's something wrong with him," but I really didn't listen. As a mother, it was hard

for me to see it. I used to get mad, and say that there was nothing wrong with my son.

Exhibit 8.

e. Mr. Mathis has significant limitations in adaptive behavior.

Mr. Mathis has significant limitation in adaptive behavior in all three AAMR domains - conceptual, social, and practical. He has significant limitations in eight of the eleven APA domains – self-direction, functional academics, home living, community living, health, leisure, communication, and social skills.

3. Mr. Mathis' limitations in intellectual functioning and adaptive behavior originated before he turned 18 years old.

The onset of Mr. Mathis' subaverage intellectual functioning before the age of 18 was addressed above in the discussion of the 1991 and 2002 IQ tests. Mr. Mathis' school records and the affidavits from his mother and other adults who knew him as a child demonstrate that his substantial adaptive behavior deficits were present throughout his childhood, well before the age of 18.

D. Conclusion

Mr. Mathis has presented a prima facie case that he is mentally retarded and exempt from execution under *Atkins*, and the application clearly satisfies the subsequent writ of requirements of Section 5. Accordingly, the Court of Criminal Appeals should so find, enter a stay of Mr. Mathis' execution, and re-

mand the case to the trial court for further proceedings. The trial court should appoint counsel, provide sufficient funds for appropriate experts and conduct a hearing on Mr. Mathis' claim of mental retardation.

CLAIM II: MR. MATHIS' EXECUTION, WITHOUT PROVIDING A FULL AND FAIR HEARING ON HIS CLAIM OF MENTAL RETARDATION AND THE TOOLS NECESSARY TO ESTABLISH HIS CLAIM VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

In *Atkins*, the Supreme Court left to the "State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences. [*Ford v. Wainwright*, 477 U.S. 399], at 405, 416-417, 106 S.Ct. 2595." The *Atkins* prohibition applies with equal force to defendants charged with capital crimes and those prisoners already sentenced to death. It is therefore incumbent upon the states to develop both at trial level and post-conviction procedures adequate to ensure that no prisoner with mental retardation is executed. Neither the Texas courts nor the legislature have developed procedures separate from Article 11.071 for protecting from execution those mentally retarded prisoners who, like Mr. Mathis, completed their initial state habeas proceedings prior to this Court's decision in *Atkins*. Article 11.071 is the only state court procedure available to such death row prisoners for enforcing *Atkins*. Accordingly, it must be applied in a way that ensures full due process protections to all death row prisoners who may be mentally retarded.

Due process requires more than merely providing a prisoner the right to file a successive petition that asserts the prisoner's ineligibility to be executed under *Atkins*. Due process demands that the state provide putatively mentally retarded prisoners a meaningful opportunity to challenge the constitutionality of their execution under *Atkins*. That requires a hearing and the tools necessary to establish mental retardation, *i.e.* appropriate mental health experts and the assistance of counsel.

A. Due process requires a hearing.

"If there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'" *Ford*, 477 U.S. at 430, (O'Connor, concurring in the result in part and dissenting in part, joined by White, J.). In *Ford*, the Supreme Court recognized the less extensive right to be free from execution while one is mentally incompetent. *Id.* at 405-06. Although disagreeing about the amount of process due, at least seven Justices in *Ford* agreed that due process demands that a person who may be incompetent must be given a hearing on the issue of his incompetency. *See id.* at 410-18 (due process requires a hearing that can reliably find the relevant facts, in the judicial rather than the executive branch) (plurality); *id.* at 423-25 (Powell, Jr., concurring in part) (due process requires an opportunity to be heard, *i.e.*, to submit materials relevant to the issue of sanity); *id.* at 427, 429-31 (O'Connor, J., with White, J., concurring in part) (once a State confers the right not to be executed while incompetent, minimal due process requirements apply, including the opportunity to be heard). Certainly no less is required of states with regard to persons who may be

constitutionally ineligible for a death sentence because they have mental retardation.

The line of Supreme Court cases addressing due process protections for persons who may be incompetent to stand trial also provide guidance. *See Drope v. Missouri*, 420 U.S. 162, 180 (1976); *Pate v. Robinson*, 383 U.S. 375, 387 (1966). In *Drope* and *Robinson*, the Supreme Court held that when there is substantial doubt about a person's competency to stand trial, due process requires a hearing. The Court further held that when credible evidence suggests the defendant may be incompetent, such evidence cannot be disregarded in favor of conflicting evidence *without a hearing*. *See Drope*, 420 U.S. at 173, fn. 9, & 179-180 (concluding that state court failed to give sufficient weight to the indicia of competence in deciding that no further inquiry was required); *Pate*, 383 U.S. at 385-386. ("While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.").

B. A prisoner who may be mentally retarded has a right to counsel and the other tools necessary to participate meaningfully in a hearing on his mental retardation.

1. The right to counsel.

For the purpose of determining death eligibility under *Atkins*, the right to counsel should be extended to death row prisoners who may be mentally retarded. Without counsel it will be virtually impossible for a mentally retarded prisoners to prepare and file the necessary pleadings and litigate a claim

of mental retardation. Putting aside the obvious problem that *pro se* mentally retarded prisoners will likely be incapable of litigating the merits of a mental retardation claim and the procedural issues inherent in successive post-conviction litigation, *pro se* prisoners in Texas are all but precluded from obtaining the basic materials needed to raise an *Atkins* claim. Without counsel, prisoners are routinely denied access to their own school, prison and other materials records that might prove their claim. *See* TEX. GOV'T CODE ANN. § 552.028(a)(1) (Vernon 2003).

The interest protected by *Atkins* is literally the right to life. It is the right to be free from exposure to a death sentence if one is mentally retarded. Under *Atkins*, a person who is mentally retarded is constitutionally ineligible to be sentenced to death, and those mentally retarded prisoners who were sentenced before *Atkins* may not be executed – ever. In the abstract, and for defendants whose trials antedate *Atkins*, this life interest arises before trial and it warrants the full panoply of due process protections required by the Eighth and Fourteenth Amendments.

Petitioner is in a position shared by a finite, but substantial, number of capital defendants: those whose trial, conviction, sentencing, appeal, and initial post-conviction litigation preceded the Supreme Court's recognition of the Eighth Amendment right to freedom from execution for the mentally retarded. As to such inmates, the protected life interest arose from the Supreme Court's pronouncement subsequent to trial. Thus, that life interest was not afforded any due process protection at trial. But, the process necessary to protect that right now is not any

less than the process required to protect a defendant's right to life and liberty at trial.

This Supreme Court's rationale for not extending the right to counsel to prisoners in post-conviction proceedings does not apply in the context of *Atkins* claims. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987). Mr. Mathis' right to counsel in these proceedings is derived not from the nature of the post-conviction proceeding but from the nature of the life interest he seeks to assert which, in his case, was not terminated by virtue of his trial. The prohibition against executing the mentally retarded did not exist at the time of Mr. Mathis' trial. Accordingly, the State cannot presume, based on the imposition of his death sentence, that Mr. Mathis is not mentally retarded. Unlike the petitioner in *Ford*, if Mr. Mathis is mentally retarded, he is constitutionally ineligible for a death sentence. The state has not yet established the right to sentence Mr. Mathis' to death under *Atkins*, and thus it does not have the same interest in upholding his death sentence that existed in *Ford*. The substantive right at stake is essentially a pre-sentencing right which is retroactive to those persons who were already under a death sentence. Fundamental fairness requires that the same procedural protections that would attach at pre-sentencing proceedings should be made available to Mr. Mathis with respect to his *Atkins* challenge in these post-conviction proceedings. Particularly, Mr. Mathis is entitled to the court-appointed assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 355 (1963).

2. Both the state's and petitioner's interest in an accurate determination of Mr. Mathis' mental condition requires that he be given access to the expert assistance he needs to establish his claim of mental retardation.

Ake v. Oklahoma, 470 U.S. 68 (1985), held that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a state provide access to a psychiatrist's assistance on this issue, if a defendant cannot otherwise afford one. For the same reasons the Supreme Court concluded that the petitioner in *Ake* was entitled to the assistance of a psychiatrist on the issue of his sanity, Mr. Mathis' is entitled to the assistance of appropriate mental health experts on the issue of his mental retardation.

Even a cursory reading of the sentencing evidence in *Atkins* demonstrates the importance of professional expertise to an accurate assessment of a person's claim of mental retardation. 536 U.S. at 308-310. The need is reinforced in this case by the absence of a mental health expert to assist counsel in explaining the available evidence of Mr. Mathis' mental retardation and in identifying and obtaining the kinds of additional information and/or testing necessary to confirm that Mr. Mathis' is mentally retarded.

3. Conclusion

In pre-trial and trial proceedings, indigents defendants will have appointed counsel. *Gideon v.*

Wainright, 372 U.S. 355 (1963). Capital defendants who may be ineligible for the death sentence because of impaired mental capacity undoubtedly have the right pre-sentencing access to mental health experts and investigate resources necessary to establish their mental retardation. *Ake v. Oklahoma*, 470 U.S. 69 (1985). In initial habeas corpus proceedings in Texas, death row prisoners have a right to appointed counsel and funds for necessary experts and investigators in order to prepare and file an post-conviction application for writ of habeas corpus challenging the legality and constitutionality of their conviction and death sentence. TEX. CODE CRIM. PROC. Art 11.071 § 2(a). However, Texas prisoners who have already been sentenced to death and have concluded their initial state post-conviction proceedings are not necessarily accorded any of these protections. Under the circumstances of this case, where the prisoner has presented credible evidence that he is mentally retarded, Section 5 of Article 11.071 must be interpreted and applied in a way that insures that he be afforded a full opportunity develop and present evidence of his retardation. That requires appointment of counsel, access to appropriate investigate and expert assistance, and a hearing. Mr. Mathis' execution without these protections will violate due process of law. Accordingly, the Court of Criminal Appeals should find that this application satisfied Section 5 of Article 11.071, stay Mr. Mathis' execution, and remand the case to the trial court with instructions to appoint counsel and provide funds necessary to obtain appropriate investigate and expert assistance. The trial court should appoint counsel and provide applicant with the funds necessary for appropriate expert and investigative assistance.

PRAYER FOR RELIEF

WHEREFORE, applicant **MILTON WUZAEL MATHIS** respectfully prays that:

A. The Court of Criminal Appeals

1. Enter a stay of execution;
2. Find that this application satisfies the Section 5 subsequent writ requirements; and
3. Remand the case to the trial court with instructions to: (a) appoint counsel; (b) provide funds for appropriate mental health experts and other necessary services; and (c) conduct an evidentiary hearing on Mr. Mathis' *Atkins* claim.

B. The trial court

1. Enter a stay of execution;
2. Appoint counsel;
3. Provide sufficient funds for experts and other necessary services; and
4. Conduct an evidentiary hearing on Mr. Mathis' *Atkins* claim.

Respectfully submitted,

/s/ Stephen A. Doggett
Stephen A. Doggett
Attorney at Law
Texas Bar No. 05945700
201 South Eleventh Street
Richmond, TX 77469
Tel. (281) 342-3321
Fax (281) 341-6458
Counsel for Applicant

VERIFICATION

STATE OF TEXAS
COUNTY OF FORT BEND

AFFIDAVIT OF STEPHEN A. DOGGETT

Before the undersigned authority appeared Stephen A. Doggett, who being sworn by me stated and deposed as follows:

I, Stephen A. Doggett, am the petitioner on the behalf of the applicant, Milton Wuzael Mathis. I was court-appointed counsel for the applicant in his federal writ proceedings. I have personal knowledge of the factual matters set forth in the foregoing application. Based on my personal review of case law, my review of the existing appellate record, my personal knowledge of the federal court proceedings, my interview of witnesses, and my personal review of documents, I attest that the factual matters set forth in this application are true and correct.

I am serving as petitioner in this cause because I have knowledge of some of the foregoing matters which the applicant does not have, and because I do not believe the applicant has the intellectual capacity to fully understand some of the matters in the application.

/s/ Stephen A. Doggett
Stephen A. Doggett

Sworn to and subscribed before me an this the 15th day of April, 2005 at Richmond, Fort Bend County, Texas.

[NOTARY SEAL]

/s/ Gloria Himly
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I certify that a copy of this application was served on counsel for the State at the following address on this the 15th day of April, 2005:

Fort Bend County District Attorney's Office
301 Jackson, Suite 101
Richmond, TX 77469

/s/ Stephen A. Doggett
Stephen A. Doggett
Counsel for Applicant

APPENDIX L

NO. _____

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

NO. 31,361-B

EX PARTE MILTON WUZAEL MATHIS,	IN THE 268TH DISTRICT COURT
APPLICANT	OF
	FORT BEND COUNTY, TEXAS

SECOND APPLICATION FOR WRIT OF HABEAS CORPUS BASED ON LEGAL GROUNDS NOT AVAILABLE WHEN THE FIRST APPLICATION WAS FILED

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Counsel for Applicant

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B. The applicant should not be subject to the death penalty because he is mentally retarded, and execution of a retarded person violates TEX. CONST. art. I, § 13.

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NO. _____

IN THE COURT OF CRIMINAL APPEALS OF
TEXAS
AT AUSTIN

NO. 31,361-B

EX PARTE MILTON WUZAEL MATHIS,	IN THE 268TH DISTRICT COURT
APPLICANT	OF
	FORT BEND COUNTY, TEXAS

SECOND APPLICATION FOR WRIT OF HABEAS CORPUS BASED ON LEGAL GROUNDS NOT AVAILABLE WHEN THE FIRST APPLICATION WAS FILED

COMES NOW the applicant, Milton Wuzael Mathis, through the undersigned court-appointed counsel, and submits this second application for writ of habeas corpus.[1]

---

[1] The petitioner in this cause is the applicant's federal habeas counsel. Statutory law permits a person other than an applicant to be a habeas petitioner. The recent amendment of the appellate rules, requiring an applicant's own signature on the new short-form application, does not apply to Capital Murder cases. In this instance the applicant's federal counsel is in a better position than the applicant is to know some of the matters germane to this application.

I.

STATEMENT OF THE CASE

The applicant was indicted for Capital Murder in Cause Number 31,361 in the 268th District Court of Fort Bend County, Texas. A jury found the applicant guilty. The jury then returned answers to special issues submitted under TEX. CODE CRIM. PROC. art. 37.071 which required assessment of the death penalty. The Court of Criminal Appeals affirmed the trial court's judgment in *Mathis v. State*, 67 S.W.3d 918 (Tex. Crim. App. 2002).

The applicant filed an application for writ of habeas corpus (the "A" writ application) on February 6, 2001. The "A" writ application did not include either of the contentions presented in this application. This Court entered findings of fact and conclusions of law, recommending denial of relief, and the Court of Criminal Appeals denied relief on April 3, 2002.

The applicant filed an application for habeas relief under 28 U.S.C. §2254 in the United States District Court for the Southern District of Texas, Houston Division. That application is presently pending before the federal district court.

II.

RESTRAINT

The applicant is an inmate of the Texas Department of Criminal Justice, Institutional Division, at the Polunsky Unit in Pork County, Texas, by virtue of a conviction and sentence of death arising from Cause Number 31, 361 in the 268th District Court of Fort Bend County, Texas. See Exhibit A, the judgment and sentence in Number 31, 361.

III.

COGNIZABILITY ON SECOND APPLICATION

This second application is based on legal grounds not available at the time the applicant's original application was filed, and indeed not even available at the time the "A" writ application was denied. Therefore this application is a proper second application under TEX. CODE CRIM. PROC. art. 11.071, §5(a)(1).

IV.

GROUNDS FOR RELIEF

This application presents two new grounds for relief:

A. The applicant should not be subject to the death penalty because he is mentally retarded, and execution of a retarded person violates U.S. CONST. amend. VIII.

B. The applicant should not be subject to the death penalty because he is mentally retarded, and execution of a retarded person violates TEX. CONST. art. I, §13.

V.

ARGUMENT AND AUTHORITIES

A.

The applicant should not be subject to the death penalty because he is mentally retarded, and execution of a retarded person violates U.S. CONST. amend. VIII.

The applicant's original application for writ of habeas corpus was filed in April, 1997. At that time

the Supreme Court was adhering to the holding in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), that execution of a mentally retarded person was not inherently a cruel and unusual punishment, such as to be categorically prohibited by U.S. CONST. amend. VIII. After state litigation in the applicant's "A" writ application was completed, and indeed after the first stage in the applicant's federal habeas proceedings was completed, the Supreme Court issued its decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, __ L.Ed.2d __ (2002). In light of *Atkins*, the applicant should not be eligible for the death penalty because he is afflicted with mental retardation.

(1) What *Atkins v. Virginia* Decided

Atkins reconsidered the Eighth Amendment issue of execution of a retarded person. A core principle of Eighth Amendment jurisprudence is the concept of "evolving standards of decency." This was recognized in *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), which observed that the Eighth Amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 596 (1958) held that application of the Eighth Amendment is guided by "the evolving standards of decency that mark the progress of a maturing society." By its nature, therefore, the Eighth Amendment dictates a continuing examination of the death penalty in light of changing conditions.

As the Court had done thirteen years earlier in *Penry v. Lynaugh*, the Court in *Atkins* examined legislation and other indicia of "evolving standards."

The *Atkins* majority opinion observed that "much has changed" since *Penry v. Lynaugh* was decided, with many states adopting legislation which barred execution of mentally retarded persons. 122 S.Ct. at 2248-2249. The *Atkins* majority concluded that "a national consensus has developed against" execution of the mentally retarded. *Id.* The Court discussed various reasons why execution of the retarded is undesirable, but in the end the issue boiled down to the "standard of decency" on this question as it has "evolved" since the time of *Penry v. Lynaugh:*

> Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender." [*Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).]

Regarding Texas in particular, *Atkins*, 122 S.Ct. at 2249, n. 16 commented that the Texas Legislature had passed such legislation, but it was vetoed by the Governor of Texas, who expressed the view that "We do not execute mentally retarded murderers today." Governor Perry needed better information, but as the Supreme Court stated, he "did not express dissatisfaction with the principle of categorically excluding the mentally retarded from the death penalty." *Id.* As far as average Texans are concerned, the tabular appendix to Chief Justice Rehnquist's *Atkins* dissent cited four polls conducted in Texas, with all four showing a majority of respondents opposing the death penalty for retarded persons. The most recent of these polls, conducted by the Scripps-

Howard newspaper organization, found 66% of Texas respondents saying "No" when asked "Should the state use the death penalty when the inmate is considered mentally retarded?" Of course the Eighth Amendment does not need newspaper polls to support its application, but those polls at least support the conclusion that the "evolving standard of decency" in Texas matches the national consensus perceived by the *Atkins* majority.

(2) The Standard for Retardation

The next step is to determine what defendants meet the definition of being "mentally retarded," thus making the death penalty categorically unavailable in their cases. *Atkins* observed that "not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 122 S.Ct. at 2250. The *Atkins* majority went on to state that it would "leave to the States the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences." *Id.* That statement of deference with how the new rule is "enforced" did not indicate that the States are entirely at liberty to define "mental retardation," such that a State could nullify *Atkins* through a restrictive definition of mental retardation. *Atkins* itself provided two similar definitions which should be considered the "floor" for Eighth Amendment protection.

(a) The Standards Recognized in *Atkins*

Footnote 3 in *Atkins* stated:

The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

The American Psychiatric Associations' definition is similar: "The essential feature of mental retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically

> used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.
>
> Footnote 5 in *Atkins* stated in pertinent part:
>
> It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 B. Sadock & V. Sadock, Comprehensive Textbook of Psychiatry 2952 (7th ed. 2000).

Synthesizing those discussions, it appears that *Atkins* recognizes mental retardation as consisting of an I.Q. of 75 or less, plus concurrent limitations in at least two areas of adaptive skills, manifested before a person reaches the age of 18. Nothing in any of the *Atkins* discussion indicates that either subaverage intelligence or deficits related to that subavergae intelligence must have come about in a particular way. On the contrary, as *Atkins* observed, it may arise from "various pathological processes." Some causes may arise during fetal development, and others may arise during a person's young life when the brain is supposed to grow and develop.

(b) Why the H.B. 416 Standard Should Not Be Used

Legislation was introduced in the 2003 regular session of the Texas Legislature in response to *Atkins*. No bill on the topic actually passed. The bill which made it farthest along was H.B. 416, which passed out of a committee in the Texas House of Representatives. That bill had several flaws which make it inappropriate to use as a standard for apply-

ing *Atkins* doctrine. Two of those will be mentioned here.

First, the bill would have utilized a measurement of intellect based on two standard deviations from an age-based norm. That would greatly complicate the burden of proof, as compared to the use of a definitive numerical figure. Since in many cases, including the applicant's case, the inquiry is retrospective, it is questionable whether the pertinent data to meet such a test even exists. This problem introduces a risk of uneven application of *Atkins*, which would in itself be problematic under the Eighth Amendment. In the event something resembling H.B. 416 passes, however, the applicant believes that evidence would show that at least his lowest scores are two standard deviations below the age-based norm. In order to prove that, a hearing and adequate funding to produce evidence on this question will be needed by this indigent applicant.

Second, H.B. 416 referred to low intellect and deficits which are manifested during a "developmental" period. What does that mean? To some jurors that might seem to refer to infancy, or even the fetal stage. Child psychologists, schooled in the theories of Piaget and other leading researchers, know that significant intellectual development continues to occur throughout childhood. The vague standard of a "developmental" period is markedly inferior to the clear demarcation line of the eighteenth birthday. In the event something resembling H.B. 416 passes, however, the applicant believes that evidence would show that his low intellect and his deficits in adaptive behavior manifested while his intellect was still undergoing development. In order to prove that, a

hearing and adequate funding to produce evidence on this question will be needed by this indigent applicant.

(3) The Applicant's I.Q.

Some testing conducted while the applicant was a child actually indicate an I.Q. above the "cut-off" mentioned in footnote 5 of *Atkins*. According to clinic notes from the medical division of the Texas Department of Criminal Justice, Institutional Division, testing while the applicant was an inmate indicates a Verbal I.Q. of 65, a Performance I.Q. of 60, and a Full Scale I.Q. of 62. (Exhibit C). The psychologist, M. Gilhousen, observed that "this performance places him in the mildly mentally retarded range of intellectual functioning," but Gilhousen also noted that the applicant's special-education placement had been due to "a learning disability rather than mental retardation." (Exhibit C). Gilhousen further stated that a diagnosis of mental retardation was not warranted because "onset did not occur before age 18." The correct statement, however, would be that a diagnosis of low I.Q. did not occur until after the applicant turned 18. It would be impossible to tell, from two tests widely separated in time, when the "onset" occurred.

The notion of an "onset" of mental retardation may seem unusual, but not when it is remembered that retardation can arise from "various pathological processes that affect the functioning of the central nervous system." *Atkins, supra*. The applicant's social and medical history showed extensive abuse of marihuana, starting when he was a child, and this included marihuana saturated with embalming fluid. This was a possible mechanism for central nervous

system destruction and resulting intellectual deterioration. That deterioration would not have had to be great, since the applicant's earlier scores were not very high: Verbal I.Q. of 77, Performance I.Q. of 85, Full Scale I.Q. of 79 (Exh. C).

(4) The Applicant's Adaptive Skill Deficits

Insight into the applicant's adaptive skills also is provided by the affidavit of the applicant's mother, Lucille Taylor. The affidavit addresses several of the adaptive skill areas mentioned in footnote 3 of *Atkins*.

Functional academics. As stated earlier, the applicant was diagnosed with a learning disorder, but his low intellect also could contribute to poor school performance. The applicant was retained in the first grade, and he did not start reading consistently until the third grade. The applicant was placed in special education.

Self-care and home living. The applicant was not able to cook well. He was able to grill a pancake but he would often put too much salt on other foods, apparently not learning from making that mistake. He had poor personal hygiene, as he would not clean up properly after using the bathroom and would not bathe himself properly, even when he was fifteen years old. When he was around ten he urinated down his own leg.

Social skills. According to his mother's affidavit, the applicant was a follower rather than a leader. He tried to play football but quit because he did not like being told what to do by the coach. The whole concept of team sports, of course, is for the

team players to work together under the coach's direction, but the applicant did not grasp it. Of course the offense itself shows that the applicant allowed himself to be drawn into bad situations.

Community use. The applicant had trouble counting money, which is a definite limitation on the use of any community facility – stores, entertainment, banks, transportation, etc. – where money had to be paid or received.

Self-direction. The applicant was characteristically a follower, not a leader.

Health and Safety. The essence of "safety" is the ability to recognize and avoid a situation which is dangerous. The applicant continually was drawn to dangerous drugs. That can be due to addiction, but low intelligence can be a contributing factor.

Work. As indicated by the applicant's mother, the applicant could not hold onto a job. He would get one or two paychecks and then find some reason for quitting. He never held any job where he had to handle money.

(5) Habeas Procedure Considerations

A few points should be made regarding habeas procedure. First, there was no procedural default at the time of trial. The legal basis for raising this complaint, namely *Atkins*, did not exist. *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991) recognized both a "futility" rationale and a "novelty" rationale for excusing a deficiency in trial objections. See also *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). Both of those rationales apply in light of the

rejection in *Penry v. Lynaugh* of the argument which ultimately prevailed in *Atkins*.

Second, there is no principle in Texas habeas law comparable to *Texas v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and 28 U.S.C. §2254(d). On the contrary, the "second and subsequent writs" provision of TEX. CODE CRIM. PROC. art. 11.071 is premised on factors similar to those which sometimes act as a federal procedural bar.[2]

This Court should recommend that relief be granted on this ground and that the judgment be reformed to show that the applicant is sentenced to life imprisonment.

B.

The applicant should not be subject to the death penalty because he is mentally retarded and execution of a retarded person violate TEX. CONST. art. I, §13.

What is true regarding the Eighth Amendment, in light of *Atkins v. Virginia*, is also true of the counterpart Texas constitutional principle. TEX. CONST. art. I, §13 prohibits "cruel or unusual" punishments. The use of "or" rather than "and" provides a reason, grounded in the constitutional language, for finding greater constitutional protection under the Texas Constitution. As with statutes, every word in a constitutional provision has meaning. The word "or" means *either* a "cruel" punishment or an "un-

---

[2] The applicant does not concede that *Teague* itself is a bar. For the record, the applicant further submits that Section 2254(d)(1) is unconstitutional to the extent it is legislation which handcuffs federal courts on important constitutional issues, specifically violating U.S. CONST. art. III.

usual" punishment is forbidden. Even if the two provisions were identical, however, the Texas Constitution would provide no less protection than the Eighth Amendment. In the interest of brevity, the applicant's entire discussion in Part V-A above is incorporated by reference for purposes of Texas constitutional analysis.

The applicant is aware that there is a case stating that Texas constitutional violations are not cognizable on habeas review, specifically *Ex Parte Dutchover*, 779 S.W.2d 76 (Tex. Crim. App. 1989). That case was incorrectly decided because it failed to consider long-standing precedent to the contrary. In *Ex parte Rodriguez*, 39 Tex. 706 (1873), Texas constitutional law was recognized as a basis for habeas relief. The total failure to mention *Rodriguez* in *Dutchover* strongly suggests that the Court of Criminal Appeals simply missed *Rodriguez* when *Dutchover* was being prepared. The correct holding would be that a Texas constitutional violation is cognizable and that relief should be granted under TEX. CONST. art. I, §13.

VI.

REQUEST FOR HEARING

Due to the nature of the issues presented, an evidentiary hearing would be appropriate. The question of mental retardation is one where expert opinion will help clarify the issue. The applicant was not examined for the purpose of an Eighth Amendment claim, either at the time of his trial or at the time of the "A" writ application. What the applicant will need, in order to have a full and fair chance to set out his claim, are, in chronological order: (a) money for

an expert, (b) expert evaluation, and (c) a hearing in which the applicant can present his evidence. Furthermore, a hearing will give the State a fair chance to conduct cross-examination.

CONCLUSION

Wherefore the applicant prays that both grounds be approved for consideration in a second application. The applicant further prays that, upon review of the issues, this Court recommend that relief be granted by reforming the judgment to punish the applicant with life imprisonment rather than the death penalty.

Respectfully submitted,

Stephen A. Doggett
Attorney at Law
Texas Bar No. 05945700
201 South Eleventh Street
Richmond, TX 77469
Tel. (281) 342-3321
Fax (281) 341-6458

Counsel for Applicant

STATE OF TEXAS

COUNTY OF FORT BEND

AFFIDAVIT OF WINSTON E. COCHRAN, JR.

Before the undersigned authority appeared Winston E. Cochran, Jr., who being sworn by me stated and deposed as follows:

> I, Winston E. Cochran, Jr., am the petitioner on the behalf of the applicant. I was appointed as counsel for the applicant in his federal writ proceedings. I have personal knowledge of the factual matters set forth in the foregoing application, based on my personal review of case law, my review of the existing appellate record, my personal knowledge of the federal court proceedings, my interview of witnesses, and my personal review of documents. I attest that the factual matters set forth in this application are true and correct. I am serving as petitioner in this cause because I have knowledge of some of the foregoing matters which the applicant does not have, and because I do not believe the applicant has the intellectual capacity to fully understand some of the matters in the application.

/s/ Winston E. Cochran, Jr.
Winston E. Cochran, Jr.

Sworn to and subscribed before me on this the 20th day of June, 2003 at Richmond, Fort Bend County, Texas.

/s/ Sharon D. Heldt
Notary Public in and for
Fort Bend County,
Texas

CERTIFICATE OF SERVICE

I certify that a copy of this application was served on counsel for the State at the following address on this the 20th day of June, 2003:

Fort Bend County District Attorney's
Office
301 Jackson, Suite 101
Richmond, TX 77469

/s/ Stephen A. Doggett
Stephen A. Doggett
Counsel for Applicant

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MILTON WUZAEL MATHIS,	§	
Petitioner,	§	
	§	
v.	§	CIVIL NO. H-03-CV-1138
	§	
DOUGLAS DRETKE, Director, Correctional Institutions Division, Texas Department of Criminal Justice,	§	
Respondent.	§	

ORDER

On February 2, 2004, this Court entered a final judgment denying Milton Wuzeal Mathis' federal habeas petition. (Docket Entry No. 18). Mathis recently filed a motion seeking reconsideration of the denial pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Docket Entry No. 19). Mathis also asks this Court to suspend his federal proceedings so that he may litigate in state court the question of whether his alleged mental retardation prevents his execution.

Mathis raises several objections to the denial of his habeas petition. For the most part, he only advances issues already considered by this Court. After

a review of the pleadings and this Court's previous order, the Court can perceive no basis for reconsidering its judgment. Mathis' motion for reconsideration is **DENIED**.

For the first time in these proceedings Mathis argues that, pursuant to recent Supreme Court authority, his alleged mental retardation exempts him from execution. He asks this Court to abate his federal proceedings while he seeks a state court judgment that would void his death sentence. While Texas law once prohibited consideration of a state habeas application during the pendency of federal proceedings, the Court of Criminal Appeals recently held that Texas law allows an inmate to proceed concurrently in federal and state court. *See Ex parte Soffar*, ___ S.W.3d ___, 2004 WL 245190 (Tex. Crim. App. Feb 11, 2004). No legal principle exists to prevent Mathis from challenging his retardation while prosecuting an appeal in this case. Mathis' request for abatement is **DENIED**.

Signed at Houston, Texas, on March 9, 2004.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX N

pillsbury

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Lee Kovarsky
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Via CM/ECF

Charles R. Fulbruge, III, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: No. 08-70021; *Mathis v. Thaler*; In the United States Court of Appeals for the Fifth Circuit

Dear Sir:

Petitioner-Appellant Milton Mathis brings to this Court's attention the recent Supreme Court decision in *Holland v. Florida*, No. 09-5327, Slip. Op. (June 14, 2010) (attached). *Holland* issued after oral argument in this case, but before this Court has decided it. In *Holland*, the Supreme Court formally recognized equitable tolling for the first time, and *Holland* is now the leading opinion on the central question in Mr. Mathis's appeal. *See Holland*, Slip Op. at 12 ("Now, like all 11 [regional circuits], we

hold that § 2244(d) is subject to equitable tolling in appropriate cases.").

Holland categorically rejects the Director's position on the diligence prong of the equitable tolling inquiry. Mr. Mathis has identified six instances where he sought to stay the initial habeas proceeding while he exhausted his *Atkins* claim. Nonetheless, at oral argument, the Director disputed diligence, contending that there existed some other obscure, complex combination of state and federal filings that *might* have preserved Mr. Mathis's *Atkins* claim. *Holland* confirms that the Director's interpretation of diligence is wrong: "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" Slip. Op. at 21 (citations omitted).[1]

As *Holland* explains, the federalism policies requiring seemingly severe application of procedural default rules to not apply to the statute of limitations. *See* Slip. Op. at 18. Excusing a procedural default requires a federal court to override a state's determination that its procedural rules have been violated, but "[e]quitable tolling . . . asks whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules, an inquiry that does not implicate a state court's interpretation of state law." *Id.* (emphasis in original).

Holland confirms that this Court should reverse and render judgment that Mr. Mathis's *Atkins* claim is timely. At the very least, this Court should

---

[1] Because the dual-forum rule satisfies the "extraordinary circumstance" prong of the equitable tolling inquiry, the issue of timeliness in this case reduced to a dispute over diligence.

vacate the district court's judgment and remand the case for a hearing on equitable tolling in light of *Holland*.

Sincerely,

/s/ Lee Kovarsky
Lee Kovarsky

Attorney for Petitioner-Appellant Milton Mathis

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing letter upon counsel for Respondent by sending same via CM/ECF this 17th day of June, 2010:

Asst. Attorney General Laura Turbin
Office of the Attorney General
Postconviction Litigation Division
Office of the Attorney General
P. O. Box 12548
Capital Station
Austin, TX 78711

/s/ Lee Kovarsky
Lee Kovarsky

APPENDIX O

IN THEN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

LIONEL RODRIGUEZ, Petitioner,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-03-2503
JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division	§	
Respondent.	§	

[PROPOSED] JOINT ADVISORY REGARDING *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002)

This is a federal habeas corpus proceeding in which Petitioner Lionell Rodriguez ("Rodriguez")[1] challenges his presumptively valid Texas capital murder conviction and sentence of death pursuant to 28 U.S.C. §§ 2241 & 2254. Rodriguez filed his skeletal federal habeas petition in this Court of January 28, 2003 and anticipates filing an amended petition on or before June 12, 2003.

Although Rodriguez concedes that the statute of limitations would preclude him from raising new constitutional claims in his amended petition that

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[1] Respondent Janie Cockrell will be referred to herein as "the Director."

were not included in his initial skeletal petition, the statute of limitations for raising a mental retardation claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), will not run until June 20, 2003, one year after the date on which *Atkins* was decided. 28 U.S.C. § 2244(d)(1)(C) (West 2003). However, such a claim would be unexhausted and would subject Rodriguez's entire petition to dismissal without prejudice. *Bell v. Cockrell*, 310 F.3d 330, 332-33 (5th Cir. 2002); *Graham v. Johnson*, 168 F.3d 762, 777-78 (5th Cir. 1999). A dismissal of the petition in its entirety would time-bar Rodriguez's remaining claims and prevent him from re-raising them once he exhausted an *Atkins* claim. Further, Rodriguez would be prohibited from prosecuting an *Atkins* claim in state court during the pendency of the instant proceeding because of the Texas habeas abstention rule. *Jackson v. Johnson*, 950 F.2d 263, 266 (5th Cir. 1992).

Therefore, both Rodriguez and the Director jointly advise the Court that the parties have agreed to the following:

1. Rodriguez will not raise an *Atkins* claim in an amended federal petition for writ of habeas corpus and, if such a claim is raised at any point during the instant proceeding, it will be voluntarily withdrawn by Rodriguez without prejudice to it being re-filed in a second or successive federal habeas petition pursuant to the "new rule" exception of 28 U.S.C. § 2244(b)(2)(A). The Director does not concede that any such petition would actually meet the requirements of § 2244(b)(2)(A).

2. If Rodriguez does not obtain relief from his death sentence in the instant proceeding, and

he wishes to raise an *Atkins* claim, he will do so by first filing a second or successive state habeas application in the Texas Court of Criminal Appeals within thirty (30) days of the date that the United States Court of Appeals for the Fifth Circuit issues mandate confirming the denial of the instant federal petition, regardless of the status of any petition for writ of certiorari in the United States Supreme Court.

3. In the event that the Court of Criminal Appeals dismisses or denies his *Atkins* claim, and Rodriguez desires to seek *Atkins* relief by filing a second or successive federal petition for writ of habeas corpus in this Court and obtains authorization to do so from the Fifth Circuit, the Director hereby waives, and will not assert, any statute of limitations defense against Rodriguez for an *Atkins* claim filed after June 20, 2003.

Respectfully submitted,
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BARRY R. McBEE
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